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## Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance

**ABSTRACT.** This Book Review addresses two important new books, Professor Kenneth Mack's *Representing the Race: The Creation of the Civil Rights Lawyer* and Professors Devon Carbado and Mitu Gulati's *Acting White? Rethinking Race in Post-Racial America*, and utilizes their insights to both explore the challenges that face the next generation of civil rights lawyers and offer suggestions on how this next generation of civil rights lawyers can overcome these difficulties. Overall, this Book Review highlights one similarity in the roles of black civil rights attorneys past and present: the need for lawyers in both generations to perform their identities in ways that make them racially representative of Blacks and racially palatable to Whites. Thereafter, this Book Review shows how the performance of black civil rights attorneys as the representatives of individuals, groups, and communities has become more complicated over time by highlighting the differences between the challenges encountered by early black civil rights lawyers and today's and the next generation's civil rights lawyers. Finally, this Book Review offers suggestions for strategies that the next generation of civil rights attorneys may use to rechannel the study and practice of civil rights law in more experimental, activist directions that attend to the complexities of how race is understood in today's society as well as the complexities of how racial discrimination is practiced today.

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*Representing the Race: The Creation of the Civil Rights Lawyer.* By Kenneth W. Mack. Harvard University Press, 2012.

*Acting White? Rethinking Race in Post-Racial America.* By Devon W. Carbado & Mitu Gulati. Oxford University Press, 2013.

*Americans have always needed—and still need—the representative Negro, even though they have always been unclear about exactly what that meant.*

— Professor Kenneth Mack<sup>1</sup>

*Being an African American in a predominantly white institution is like being an actor on stage. There are roles one has to perform, storylines one is expected to follow, and dramas and subplots one should avoid at all cost. Being an African American in a predominantly white institution is like playing a small but visible part in a racially specific script. The main characters are white. There are one or two blacks in supporting roles. Survival is always in question. The central conflict is to demonstrate that one is black enough from the perspective of the supporting cast and white enough from the perspective of the main characters. The “double-bind racial performance” is hard and risky. Failure is always just around the corner. And there is no acting school in which to enroll to rehearse the part.*

— Professors Devon Carbado and Mitu Gulati<sup>2</sup>

## INTRODUCTION

This Book Review addresses two important new books: Professor Kenneth Mack’s *Representing the Race: The Creation of the Civil Rights Lawyer*<sup>3</sup> and Professors Devon Carbado and Mitu Gulati’s *Acting White? Rethinking Race in Post-Racial America*.<sup>4</sup> Both books provide valuable insights into how best to train the next generation of civil rights lawyers. By now, it is nearly axiomatic that civil rights lawyers serve an important expressive and instrumental function in the enforcement of constitutional and statutory entitlements and in the advancement of racial and gender equality. Over time, civil rights lawyers

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1. KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* 5 (2012).
  2. DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* 1 (forthcoming 2013) (on file with authors). This book is scheduled to be released in the weeks between the completion and the publication of this Book Review.
  3. MACK, *supra* note 1.
  4. CARBADO & GULATI, *supra* note 2.

have come from the ranks of private and nonprofit law firms as well as academic and government outposts. Their work spans more than a century of American history and has generated a substantial body of academic literature across multiple disciplines.

In light of this rich and significant history, it is surprising to discover the scarcity of contemporary writing on the education and training of civil rights lawyers. Read closely, neither the growing academic literature of the civil rights movement nor the current theory/practice literature of clinical legal education devotes meaningful energy or attention to actually teaching civil rights lawyers how to address new forms of discrimination and inequality in our increasingly diverse, multiracial society. The two books at hand provide the promising opportunity to do exactly that: to look backward and ahead in order to help steer the next generation of civil rights lawyers.

In *Representing the Race*, Mack addresses the fundamental question of what it meant for a black civil rights lawyer to be a “representative man” both before and during the civil rights era. According to Mack, from the mid-1800s to the end of the civil rights movement, black, male civil rights lawyers found themselves trapped in a confounding dilemma. On the one hand, they needed to be as different as possible from other Blacks<sup>5</sup> in order to speak to and gain

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5. Throughout this Book Review, we capitalize the words “Black” and “White” when we use them as nouns to describe a racialized group; however, we do not capitalize these terms when we use them as adjectives. Additionally, we find that “[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies.” Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4. Professor Kimberlé Crenshaw, one of the founders of Critical Race Theory, has explained that “Black” deserves capitalization because “Blacks, like Asians [and] Latinos, . . . constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Also, we generally prefer to use the term “Blacks” to the term “African Americans” because “Blacks” is more inclusive. For example, while the term “Blacks” encompasses black permanent residents or other black noncitizens in the United States, the term “African Americans” includes only those who are formally Americans, whether by birth or naturalization. That said, given the historical nature of several parts of this Book Review, and in light of the fact that a large influx of black immigrants did not occur in the United States until the 1960s and 1970s, we sometimes use the term “African American” where the term “Black” is not needed for inclusivity reasons. See Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1484 (2002) (“The year 1965 thus marked the beginning of a much more diverse, far less European immigrant stream into this country.”). These black immigrants primarily came from the Caribbean. See John A. García, *Caribbean Migration to the Mainland: A Review of Adaptive*

the trust of Whites. On the other hand, they had to be “as much like the masses of black people as possible” in order to be perceived as “‘authentic’ . . . representative[s]” of their community.<sup>6</sup>

In addition to playing the dual roles of “white” lawyer and authentic black representative, black male civil rights lawyers both before and during the civil rights era also served as living proof of their own arguments about equal rights and equal access for Blacks.<sup>7</sup> For example, as Mack points out, during the antebellum period, a black male attorney like John Mercer Langston<sup>8</sup> personified to “abolitionist-minded whites . . . everything that the colored race might become once it threw off the shackles of slavery.”<sup>9</sup> Similarly, through their performances in court, attorneys like Charles Hamilton Houston<sup>10</sup> could alter the thinking of judges, adversaries, and others who saw their legal skills and acumen in action.<sup>11</sup> Indeed, it soon became clear that there were strategic advantages to having Blacks *themselves* argue against practices like educational discrimination, as their own presence became the most important evidence for their claims.

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*Experiences*, 487 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 115, 121-23 (1986) (noting that the most significant influx of Caribbeans into the United States occurred after 1971); Milton Vickerman, *Jamaica*, in THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965, at 479, 479 (Mary C. Waters & Reed Ueda with Helen B. Marrow eds., 2007) (noting that around 570,000 Jamaicans arrived in the United States between 1971 and 2004); see also Marilyn Halter, *Africa: West*, in THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965, *supra*, at 283, 290 (noting that during the period from the 1960s to the 1980s, “a significant proportion of West African newcomers were highly skilled professionals, students, and exchange visitors” who did not return to their home countries).

6. MACK, *supra* note 1, at 5.
7. *Id.* at 20 (“Their mere existence was an effective argument for equal citizenship.”).
8. John Mercer Langston became the first African-American lawyer in the United States in 1843. David B. Wilkins, *The New Social Engineers in the Age of Obama: Black Corporate Lawyers and the Making of the First Black President*, 53 HOW. L.J. 557, 559-60 (2010). “[A] Republican lawyer and former Freedman’s Bureau official,” Langston became a “professor of the law department at Howard in 1868, dean in 1870, and acting University president in 1873.” Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880-1890*, 77 FORDHAM L. REV. 1479, 1489 (2009).
9. MACK, *supra* note 1, at 14.
10. Charles Hamilton Houston served as legal counsel for the NAACP, and he was a key strategist in the civil rights battle to dismantle segregation. He graduated from Harvard Law School, where he was the first black student to be elected editor of the *Harvard Law Review*. Houston later served as Dean of Howard University School of Law, where he mentored students such as Thurgood Marshall. Maurice C. Daniels & Cameron Van Patterson, *(Re)considering Race in the Desegregation of Higher Education*, 46 GA. L. REV. 521, 538 (2012).
11. MACK, *supra* note 1, at 108.

In *Acting White?*, meanwhile, Carbado and Gulati reveal how race is defined not only by physical markers such as skin color, but also by performance or behavior. They enlarge the concept of color-based identity status to include the notion of “working identity,” which encompasses racially associated ways of being, such as how one dresses, how one styles one’s hair, and how one speaks. To Carbado and Gulati, decisionmakers across society—for example, employers, judges, juries, and law enforcement officials—make judgments based on racial criteria and expectations. As Carbado and Gulati suggest in *Acting White?*, a civil rights lawyer’s failure to work his identity to match such criteria (that is, to be perceived as acting white or black at the right time and in the right circumstances) can result in interracial and intraracial discrimination and disadvantage for both lawyer and client.

Carbado and Gulati’s notion of working identity, as well as their examples of identity in action, provide a useful foundation for exploring the similarities and differences between the functions and symbolic meanings of past and present civil rights lawyers. In particular, Carbado and Gulati explain how people of color communicate the salience of their race and try to avoid or encourage the imposition of racial stereotypes upon them in different contexts—what the two scholars have called “identity performance” in previous work.<sup>12</sup> This concept supplies the base from which we will identify the commonalities between past and present civil rights lawyers’ experiences and roles and discuss the important distinctions between the challenges they face.<sup>13</sup>

We will highlight one similarity in the roles of black civil rights attorneys past and present: the need for lawyers in both generations to work their identities in ways that make them racially palatable to Whites. Using Carbado and Gulati’s theory, we will explain how today’s black civil rights attorneys are under the same pressure to earn the trust and respect of Whites, who are still overwhelmingly the decisionmakers in the judicial system, and to do so by performing their identities in ways that make them racially safe.

Next, we will show how the performance of black civil rights attorneys as the representatives of individuals, groups, and communities has become more

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12. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279-93, 1299-1307 (2000) (describing identity performance as the conscious strategic choices made by minorities who wish to repudiate or negate stereotypes about their identity).

13. CARBADO & GULATI, *supra* note 2, at 3 (“Working Identity is costly. It can cause people to compromise their sense of self; to lose themselves in their racial performance; to deny who they are; and to distance themselves from other members of their racial group. Plus, the strategy is risky. Staying at work late to negate the stereotype that one is lazy, for example, can confirm the stereotype that one is incompetent, unable to get work done within normal work hours.”).

complicated over time. Specifically, we will explore and analyze three major differences between the experiences of the black civil rights lawyers of the past and the present: (1) the different symbolic meanings that the general public, Blacks, and Whites, depending upon the context, assign to the two different generations of attorneys; (2) the existence of wider divisions within the black population today than in the past; and (3) the heightened visibility and voices of previously marginalized intersectional groups like black women and black gays and lesbians, whose own issues and concerns have helped to bring increased attention to various rights movements related to gender, sexuality, immigration status, and class.

This Book Review proceeds in four Parts. Part I parses Mack's collective biography of a group of black civil rights lawyers during segregation in order to understand traditional notions of what it means to be a "representative man" in civil rights history and practice, including the different meanings of that phrase for early black female lawyers. Part II examines Carbado and Gulati's analysis of the "double bind" that black professionals must face in today's society and, in so doing, introduces the common themes between *Representing the Race* and *Acting White?* and their intersecting accounts of race and race relations in American law, culture, and society. Part III draws on Mack's assertions about the dual roles of early black civil rights lawyers who were "representing the race" and Carbado and Gulati's theory of identity performance to explain how the challenges faced by today's civil rights lawyers differ in significant ways from those encountered by earlier generations. Part IV articulates strategies for today's civil rights attorneys that encourage them to rechannel the study and practice of civil rights law in more experimental, activist directions in order to aid communities that are historically segregated or resegregated by race, class, and ethnicity and that are increasingly isolated from the middle-class mainstream of all races. The Conclusion revisits the core themes of this inquiry, fastening ties to a broader history of critical theory, and specifically Critical Race Theory.

This Book Review's purpose is to develop new methods of teaching law students and lawyers to make normative and instrumental choices about civil rights programs and policies in ways that are designed to address persistent racial inequities, and about the means they may choose to influence the meaning of race and combat the practice of racism in our society. These new approaches for teaching and training civil rights lawyers emerge within a movement that has evolved from a black/white paradigm to a more racially inclusive and gender-inclusive structure for discussing civil rights law. Accordingly, they account for and acknowledge the realities of a society that has shifted from the nearly complete exclusion of minorities, particularly Blacks, from status, power, and wealth to the selective but more widespread inclusion of minorities in circles of education, power, and status.



## I. CIVIL RIGHTS LAWYERS AS REPRESENTATIVE MEN OF THE COLORED RACE

This Part considers Mack's account of race, identity, and representation and his treatment of race relations in chronicling the civil rights work of black lawyers. It begins with the idea of the "representative Negro" and the relationship between racial identity and the market for lawyers. Next, it turns to the form and substance of racial identity in the segregated public space of courtrooms. It then expands to pull together the racial and gender identities and internal conflicts of women lawyers that, in important ways, foreshadowed the broadened definition of civil rights that has emerged since the end of the black civil rights movement of the 1950s and 1960s. Last, it deals with the contradictions of prewar and postwar race and representation.

### *A. Race, Identity, and Representation: On Being a "Representative Negro"*

Mack explores the notions of race, identity, and representation and the history of race relations in the nineteenth and twentieth centuries through the work of black lawyers who mounted challenges to discrimination and segregation. His study of the professional culture and desegregation work of several generations of black lawyers reveals the tensions embedded in the core "segregation-to-integration narrative" of race and the public memory of racial progress in American history.<sup>14</sup> In place of this dominant narrative, Mack assembles a collective biography of a group of black civil rights lawyers from the Jim Crow to the post-civil rights era.<sup>15</sup> His main purpose is to understand the "enduring paradox" of racial representation experienced by the lawyers—both black and white representatives of Blacks—"who claimed to speak for, stand in for, and advocate for the interests of the larger group."<sup>16</sup>

Mack explains that the "usual story" of civil rights in American history maintains that black lawyers "represented the interests of a unified minority group that wanted to be integrated into the core fabric of the nation."<sup>17</sup> This story, he points out, overlooks the difficult dilemma confronting black civil rights lawyers "caught between the needs and desires of the larger,

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14. MACK, *supra* note 1, at 3.

15. *Id.*

16. *Id.* at 4.

17. *Id.*

white-dominated culture, and those of their own racial group.”<sup>18</sup> For Mack, that dilemma frames the crucial question whether civil rights lawyers “represented the cultural values of the larger group, or those of the minority.”<sup>19</sup> Borrowing from the common usage of mid-nineteenth-century America, Mack employs the terms “representative man” and “representative woman” to describe “a person who encapsulated the highest aspirations of his racial or cultural group, in terms of education, professional advancement, and intellectual ability.”<sup>20</sup> He adds that the existence of such persons manifested “a potent argument” for equal citizenship and, therefore, for the “inclusion of marginalized peoples in the larger fabric of American life.”<sup>21</sup>

Mack reports that neither Blacks nor Whites were sure “what they meant when they demanded that civil rights lawyers be ‘representatives’ of the minority group.”<sup>22</sup> In the era of segregation, he notes, “a representative black person often had to be as *unlike* most members of the minority group as possible.”<sup>23</sup> And yet, at the same time, “both blacks and whites often demanded that the representative be an ‘authentic’ black person—someone as much *like* the masses of black people as possible.”<sup>24</sup> Starting from the mid-nineteenth century, Mack investigates the conceptual dissonance of a “representative colored man” (later the “representative Negro”) among Blacks and Whites, remarking that “no one knew which of these two senses of representation they meant when they casually applied the term to prominent African Americans, often lawyers.”<sup>25</sup> Significantly, he writes, “people often spoke of representation in both senses at once.”<sup>26</sup>

Mack cites black civil rights lawyers as a “prime example” of the ambiguity and duality of race and racial identity inside as well as outside the American courtroom.<sup>27</sup> Inside the courtroom, he explains, civil rights lawyers found “none of the decision makers”—judges or jurors—to be “members of their own

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 5.

23. *Id.* (emphasis added).

24. *Id.* (emphasis added).

25. *Id.*

26. *Id.*

27. *Id.*

race.”<sup>28</sup> Outside the courtroom, the same lawyers found many observers—black and white—quick to graft the racial “hopes and dreams of an entire race” onto their experiences.<sup>29</sup> Mack emphasizes that “by becoming a lawyer and coming to court, a black person stepped outside his individual identity as practicing lawyer and, for blacks and whites alike, seemed to stand in for the masses of African Americans who could never come to court and interact with whites as equals.”<sup>30</sup> This act of boundary crossing informs Mack’s central claim about law, culture, and society: “[T]hat law constructs race, or more accurately that lawyers construct race.”<sup>31</sup> Racial identity itself, he asserts, “varies with social context,” by turns “fluid and malleable” in determining “who had access to public space and what kinds of things they could do and say once they got there.”<sup>32</sup> Similarly, as many of these black civil rights lawyers found, racial boundaries proved to be just as permeable—at least within the courtroom—despite the harsh demarcations of segregation and the deep-seated prejudices of a white-dominated legal profession.<sup>33</sup>

Against this background, Mack asks: “What does it mean to represent a race?”<sup>34</sup> Cast in the form of a group biography of known and little-known black lawyers, Mack’s narrative encompasses black male lawyers who “often confounded the expectations of everyone around them by coming to court and being treated like white men” and black women lawyers who “fit uneasily into the American narrative of minority group representation” and thus, in many ways, could not serve as so-called representative Negroes.<sup>35</sup> Mack traces the idea of the representative Negro to the nineteenth-century moment when John Mercer Langston “placed himself between two racial groups simply by deciding to become a lawyer.”<sup>36</sup> He describes Langston as “the quintessential nineteenth-century representative black man,” personifying Blacks’ potential for abolitionist-minded Whites and symbolizing to Blacks and Whites “the struggles of a poorly educated mass of enslaved and free African Americans.”<sup>37</sup>

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28. *Id.* In the courtroom, “[a] black person labored publicly under the gaze of white observers.” *Id.*

29. *Id.* at 6.

30. *Id.*

31. *Id.* at 7.

32. *Id.* at 7–8.

33. *Id.* at 8.

34. *Id.* at 6.

35. *Id.* at 8.

36. *Id.* at 13. See *supra* note 8 for details on John Mercer Langston.

37. MACK, *supra* note 1, at 14.

In the early twentieth century, Mack continues, a new group of young black leaders in northern cities, notably Philadelphia's Raymond Alexander<sup>38</sup> and Chicago's Earl Dickerson,<sup>39</sup> worked to advance the notions of representative men and women by deploying state civil rights statutes to open nondiscriminatory access to public accommodations.<sup>40</sup> Their success turned not only on their legal talents, but also on complexion, education, and the cross-racial ability to interact with Whites in segregated public accommodations, particularly within the public space of courtrooms.<sup>41</sup> As before, to succeed as a racial representative among Whites and simultaneously as an authentic leader among Blacks, these lawyers had to cross the racial lines of segregated public space and to speak a language that white judges and jurors could understand.<sup>42</sup> To do so, they "often had to practice a studied racial ambiguity," which for Mack meant an experience "fraught with deeply conflicted emotions and desires."<sup>43</sup>

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38. Raymond Alexander was a pioneer of the Pennsylvania bar and one of the most prominent African-American attorneys of his era. Alexander, the first black graduate of the University of Pennsylvania's Wharton School in 1920, earned his law degree from Harvard. See *Pioneering Lawyer, Judge, and Civil Rights Leader: Raymond Pace Alexander, W'20*, WHARTON SCH., <http://www.wharton.upenn.edu/125anniversaryissue/alexander.html> (last visited Feb. 17, 2013). He later served as President of the National Bar Association, starting in 1929, four years after the national organization of black attorneys was formed. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 288 (2005). His wife was Sadie Alexander. See *infra* note 81.
39. Earl Dickerson was the first African-American graduate of the University of Chicago Law School. Dickerson played a crucial role in litigation dedicated to ending racially restrictive covenants in Chicago. He was the lead attorney in the racial-covenant case *Hansberry v. Lee*, 311 U.S. 32 (1940); he also cofounded the NAACP Legal Defense and Education Fund and coauthored an amicus brief in *Shelley v. Kraemer*, 334 U.S. 1 (1948), which made racially restrictive covenants legally unenforceable. Finally, Dickerson became the first African American elected to lead an integrated national bar organization, when he served as President of the National Lawyers Guild from 1951 to 1954. Jay Tidmarsh & Stephen Robinson, "The Dean of Chicago's Black Lawyers": Earl Dickerson and Civil Rights Lawyering in the Years Before Brown, 93 VA. L. REV. 1355, 1360-67 (2007) (reviewing ROBERT J. BLAKELY WITH MARCUS SHEPARD, EARL B. DICKERSON: A VOICE FOR FREEDOM AND EQUALITY (2006)).
40. MACK, *supra* note 1, at 36.
41. See *id.* at 31.
42. *Id.* at 37.
43. *Id.*

*B. Racial Identity in the Public Space of the Courtroom*

Mack maps racial identity in the public space of the courtroom and, to a lesser extent, within the bar during the Depression decade of the 1930s. For Mack, the 1930s shaped the rise of the black civil rights lawyer who defended black clients in high profile, civil rights-imbued criminal cases, such as the Willie Brown and George Crawford trials. Brown stood trial in Philadelphia for the sexual assault and murder of a seven-year-old white girl.<sup>44</sup> Crawford stood trial in Virginia for the murder of a wealthy socialite and her maid.<sup>45</sup> Pointing to the shift from white to black defense teams in the *Brown*<sup>46</sup> and *Crawford*<sup>47</sup> criminal cases, Mack documents the efforts of black lawyers to “push back against the bounds of racial identity” and convince white lawyers and judges that they were “as nearly as possible” like them.<sup>48</sup>

*1. Courtrooms as Segregated Public Spaces*

Mack locates the *Brown* and *Crawford* courtrooms within the segregated public space of American law, culture, and society. Unlike other cultural and social spaces, he notes, courtrooms stood “open to the crossing of racial boundaries.”<sup>49</sup> Surprisingly, in the public space of the courtroom, “a black lawyer could inhabit a professional role that demanded a type of formal respect accorded to an elite member of society.”<sup>50</sup> That formal “social script,” he remarks, allowed black lawyers not only to reimagine racial identity, but to perform and often improvise in a role and a language “solely associated with whites in almost every other public place.”<sup>51</sup> For Mack, the work displayed in early twentieth-century courtrooms transformed “the black lawyer into a figure with a deeply malleable identity”<sup>52</sup> and influenced “racial interaction even

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44. *Id.* at 61.

45. *Id.* at 83, 88.

46. *Id.* at 70-82.

47. *Id.* at 83-110.

48. *Id.* at 62.

49. *Id.* “In court,” Mack notes, black lawyers “experienced a world in which forms of address, patterns of deference, and professional acts crossed racial lines, within some limits at least.” *Id.* at 64.

50. *Id.* at 63-64.

51. *Id.* at 64 (“Black lawyers imagined that, by coming to court, they could change even the language in which race was spoken about.”).

52. *Id.* at 67.

outside the courthouse.”<sup>53</sup> Courtrooms in fact resembled “public marketplaces where black lawyers bought and sold prestige and social standing as well as money and legal services.”<sup>54</sup>

Courtrooms, Mack explains, afforded critical opportunities to challenge the segregated space (seating, restrooms, and refreshment facilities) and “social etiquette” of Northern and Southern communities where custom and language “helped make racial identity.”<sup>55</sup> To intrude on what was generally a space reserved for Whites only, he mentions, black lawyers relied on their “common professional identity” to claim the prerogatives of advocacy, such as the discretion to cross-examine white witnesses and the entitlement to demand equal treatment from judges and opposing lawyers.<sup>56</sup> However, even in courtrooms and communities where such acts were tolerated by white judges and lawyers, he cautions, “black lawyers still walked a fine line between the social deference that a lawyer could expect and the subservient role reserved for African Americans.”<sup>57</sup>

## 2. Civil Rights Courtrooms

The civil rights struggles of the 1930s in the public space of Southern courtrooms further transformed racial identity. Mack charts this controversial and symbolic transformation through the work of the all-black defense teams led by Raymond Alexander in the *Brown* case and by Charles Hamilton Houston in the *Crawford* case. Both defense teams signaled a break from the longstanding preference of the NAACP to retain white lawyers for the trials of important civil rights cases.<sup>58</sup> At the *Brown* trial in Philadelphia, Mack indicates, Alexander struggled to overcome his “outsider” racial identity in a hostile courtroom environment, ultimately failing to persuade the all-white jury of Brown’s innocence or to forgo a death sentence.<sup>59</sup> On appeal, however, Alexander successfully “crossed the color line” by calling upon the “scripted

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53. *Id.* at 65.

54. *Id.* at 68.

55. *Id.* at 85 (“In the front of the courtroom, black witnesses had to be addressed by their first names, as they were in other public places.”).

56. *Id.*

57. *Id.* at 86 (“During the Jim Crow era, the appearance of a black lawyer in court was a performance that cut against the grain of normal racial interaction in a manner so striking that a good portion of the local community might turn out to watch.”).

58. *Id.* at 68–70.

59. *Id.* at 74, 81.

public courtesy” of the professional “fraternity” of the bar and bench, despite “subtexts” of racial paternalism and prejudice, and by embodying the “aspirations of his own racial group.”<sup>60</sup> This momentary crossing of racial culture and space produced a reversal and a retrial, which concluded in a plea-bargained life sentence for Brown.<sup>61</sup>

In contrast, at Crawford’s 1933 trial in Loudoun County, Virginia, the Houston-led, NAACP-sponsored all-black defense team waged an even larger struggle beyond the representation of a single client or cause—a struggle that resulted in Crawford’s conviction, but a sentence of life imprisonment instead of death, and that fundamentally altered the idea of racial representation.<sup>62</sup> At the *Crawford* trial, Mack observes, the Houston defense team “encountered a different courtroom” not only in terms of geography and law, but also in terms of culture and society, a courtroom that had been purposefully refashioned by Virginia judges to treat black lawyers “like white men” and to integrate them “into the local professional community.”<sup>63</sup> This altered space, Mack notes, opened “a new world of racial possibility” for black lawyers, yet roiled black communities already troubled by state-sanctioned discriminatory practices in jury selection and by what they perceived as the law-sponsored lynching of Crawford and other accused black criminal defendants in Southern courtrooms.<sup>64</sup>

Mack’s account of the increasing discord between black civil rights lawyers like Houston and black Southern communities highlights tensions within the civil rights movement over the pace and scope of campaigns to desegregate juries and public accommodations. More specifically, the account links the *Crawford* defense team’s posture of “social statesmanship,” bolstered in part by Crawford’s morally ambiguous escape of a death sentence, to an institutional political controversy embroiling the NAACP itself. To Mack, the *Crawford* controversy disclosed elements of both consensus and dissension within the NAACP. This internal tension exploded into public condemnations of the *Crawford* defense team’s “less-than-aggressive trial strategy,”<sup>65</sup> including Houston’s portrayal of Crawford “as an obedient ‘homeless hungry dog,’”<sup>66</sup>

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60. *Id.* at 76–77, 81–82.

61. *Id.* at 74–76.

62. *Id.* at 106.

63. *Id.* at 168.

64. *Id.* at 173.

65. *Id.* at 179.

66. *Id.* at 105.

and the NAACP's institutional neglect of grassroots organizing and advocacy on behalf of black workers and farmers.<sup>67</sup>

For Mack, the Southern-based racial struggle and civil rights defense conflict embodied in the *Crawford* trial "would play out over the next several decades as a small group of lawyers became known in their local communities, and sometimes nationally, as the authentic representatives of African Americans."<sup>68</sup> Houston, in defending Crawford, "seemed to personify the aspirations of African Americans all over the South who were excluded from meaningful participation in the criminal justice system."<sup>69</sup> Yet, Mack remarks, "Houston seemed more and more to represent the values of the local community of white southern lawyers" rather than to serve as "the authentic representative of blacks."<sup>70</sup> In the ensuing decades, he comments, this recurrent paradox of racial identity weighed upon and sometimes overshadowed the vital work of black civil rights lawyers.<sup>71</sup>

Mack demonstrates that when black civil rights lawyers crossed racial lines in the role of a representative man within the public space of civil rights courtrooms, they altered their subordinate "racial status" and the hierarchical "script for racial interaction."<sup>72</sup> In doing so, they opened for personal and professional debate the question of what it meant to represent their own race and the race of their clients in Northern and Southern courtrooms.<sup>73</sup> Put differently, when black civil rights lawyers like Brown, Houston, and Marshall crossed the color lines of civil rights courtrooms, they allowed others—white lawyers and judges as well as white and black communities—to reimagine what it meant to represent a race.<sup>74</sup>

Mack reminds us that, for both courts and their local communities, "[t]he authentic representative of African Americans . . . was a black lawyer who seemed as much like his white colleagues as possible."<sup>75</sup> The difficulty here, he stresses, lay in the fact that "each group wanted something different."<sup>76</sup>

67. *Id.* at 178.

68. *Id.* at 84.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 93, 95.

73. *Id.* at 98.

74. *See id.* at 128 ("When Marshall and his colleagues came to court in southern civil rights cases, everyone saw them as much more than lawyers representing clients.").

75. *Id.* at 112.

76. *Id.*



Typically, white lawyers endorsed a representative man “who could explain to a skeptical black public that the legal system treated them fairly,” while black communities embraced “an African-American lawyer whose acceptance by whites gave him the power to call out racial inequity in the system.”<sup>77</sup> Thurgood Marshall and other civil rights lawyers, Mack suggests, derived their courtroom success from their ability not only to “convince” each discrete racial community that they “represented its particular point of view,” but also to “perform like a white man” inside the courtroom itself.<sup>78</sup> A new generation of black civil rights lawyers deliberately honed this ability to perform sufficiently like a white man in a Southern courtroom to gain acceptance into the “fraternity” of the white bar and bench, while appearing as an authentic representative of their racial group. It both advanced and burdened legal-political campaigns for racial equality in American history,<sup>79</sup> and hindered possibilities of intersectional race and gender equality. Although “performing like a white man” left some room for black male lawyers to create a space for themselves in the fraternity of the bar and bench, there was no such room for black female attorneys.

### C. Black Women Lawyers

To Mack, black women lawyers, in their aspirations and struggles, “meshed uneasily with the American narrative of minority group representation” that was determined by white male professional norms, courtroom performance, and admission into “local fraternit[ies] of white lawyers.”<sup>80</sup> Although black women lawyers, such as Sadie Alexander<sup>81</sup> in

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77. *Id.*

78. *Id.* at 112, 119; *see also id.* at 128 (“Representative white men looked across the courtroom and saw—or desired to see, at least—black lawyers who were their mirror images.”).

79. *Id.* at 130 (“It remained true that black and white communities often constructed profoundly different narratives out of the same set of observations of what happened in a courtroom.”).

80. *Id.* at 131–32.

81. Sadie Alexander was the first black female graduate of the University of Pennsylvania Law School, the first black woman to be admitted to the Pennsylvania bar and to practice law in the Commonwealth of Pennsylvania, the first black woman to work as an assistant city solicitor in Philadelphia, the first black female attorney for the Council of Bishops of the African Methodist Episcopal Church, and the first black woman appointed to a presidential commission. Wink Twyman, *Against All Odds: The Story of Sadie Tanner Mossell Alexander*, PA. LAW., July/Aug. 2006, at 38, 41–42; *see also* Kenneth Walter Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, 87 CORNELL L. REV. 1405 (2002) (presenting a social history of Alexander’s everyday professional life).

Philadelphia and Pauli Murray in New York, achieved national stature as civil rights leaders—that is, as “representative women of the race”—Mack describes their experience of discrimination and exclusion as “disorienting.”<sup>82</sup> Murray drew upon that shared “sense of displacement” in her later efforts contributing to the “creation of sex discrimination as a category of modern American law.”<sup>83</sup>

To illustrate black women lawyers’ complex choices, Mack examines the career of Pauli Murray and her pathbreaking vision of Jane Crow sex discrimination. Murray, he reports, suffered from a crisis of identity denoted by an “inability to fit in, particularly in public places where her racial and gender appearance often seemed ambiguous.”<sup>84</sup> Long in developing, that crisis convinced Murray that she served as a representative of neither Whites nor Blacks and of neither men nor women.<sup>85</sup> Instead, Mack explains, Murray felt that she was something apart from and outside of the “conventional binaries of identity—black and white, and heterosexual and homosexual.”<sup>86</sup> Interweaving notions of group identity, sexuality, and discrimination in public space, Mack links Murray’s idea of Jane Crow segregation to the equality debates of the 1960s and to broader personal identity and individual autonomy claims of modern human rights campaigns.<sup>87</sup> Turn next to the prewar and postwar era of race and representation.

#### *D. Prewar and Postwar Race and Representation*

Mack presents the prewar and postwar era of race and representation as a landscape of cultural conflict, economic discontent, and generational clash. Already unsettled, that landscape was further scarred by the crisis that engulfed the black bar and prompted new questions for the “representative men” of the black community.<sup>88</sup> Mack distills these questions into two:

Could a black lawyer really represent his race and at the same time be folded into the larger community of lawyers? Was it really possible to

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82. MACK, *supra* note 1, at 132.

83. *Id.*

84. *Id.* at 207.

85. *Id.* at 208.

86. *Id.* at 215.

87. *Id.* at 233.

88. *Id.*

practice one's trade in a world where both blacks and whites seemed to demand that the lawyers be at once both authentic and atypical?<sup>89</sup>

The crisis of the black bar in the postwar era, Mack contends, arose out of the contradiction basic to racial representation bound up in the dissonant belief that black civil rights lawyers "could stand in for the masses of African Americans, and at the same time represent the viewpoint of the communities of white lawyers in which they found themselves."<sup>90</sup> That dissonance strained the growing generational conflict Mack describes between a younger group of black lawyers (Loren Miller, Benjamin J. Davis, Jr., and John P. Davis) and an older set of lawyers (Charles Hamilton Houston, William Hastie, and Raymond Alexander) over the Victorian ideal of the self-made man and the values of "hard work, thrift, savings, and success in the market economy as the route to responsible manhood."<sup>91</sup> Those professional and generational tensions were further roiled by external, unanticipated causal forces related, for example, to the civil rights controversy in Scottsboro, Alabama, over the criminal trial and capital sentencing of nine young black men who were accused of raping two white women in 1931.<sup>92</sup> Both black and white critics, Mack notes, derided the Scottsboro trial and its resulting death sentences as the "equivalent of lynchings," sparking upheaval in the political consciousness of the civil rights bar, especially for representatives of poor Southern Blacks.<sup>93</sup> Consider an exemplar of that transformative upheaval in the trial of Angelo Herndon.

### 1. *The Trial of Angelo Herndon*

In parsing the politics of the 1933 Georgia trial of Angelo Herndon,<sup>94</sup> Mack finds that "many black lawyers imagined courtrooms to be nonracial spaces."<sup>95</sup> Inside Northern and Southern courtrooms, Mack elaborates, black and white lawyers and judges "could interact as equals" under circumstances of

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89. *Id.* at 155.

90. *Id.*

91. *Id.* at 184.

92. *Id.* at 156.

93. *Id.* at 157.

94. The case later ended up before the Supreme Court. See *Herndon v. Georgia*, 295 U.S. 441 (1935).

95. MACK, *supra* note 1, at 158.

“cross-racial professionalism” in spite of acknowledged “racial inequity.”<sup>96</sup> Their interaction, he adds, left certain central questions unresolved. For instance: “Exactly what was the relationship between courtroom space and race? Did black lawyers really stand in for the rest of the race when they made common cause with their white counterparts?”<sup>97</sup>

For Mack, the *Herndon* criminal trial reflects the narrative ambiguity fundamental to racial representation. That ambiguity generates two competing narratives of civil rights representation contingent on class, race, and politics. The standard narrative, pronounced by the established leadership of the black bar, declared lawyers’ cross-racial practice, black-white “camaraderie,” and courtroom “professionalism” essential to civil rights advocacy and the rule of law.<sup>98</sup> The opposing narrative, offered by a younger, insurgent faction of the black bar, scorned cross-racial practice “camaraderie” and courtroom “professionalism” as a form of capitulation and retreat from civil rights and as surrender to law-sanctioned lynching.<sup>99</sup>

The *Herndon* trial, in which the defendant was a black working-class Communist organizer of the poor-relief movement in Atlanta who was charged with the capital crime of violating Georgia’s anti-insurrection law, revealed the growing identity schism in the black bar. Led by Ben Davis, the all-black defense team, in challenging evidence of insurrectionist activity, acceded to Herndon’s demand “about the viewpoint through which he wanted his trial to be seen,”<sup>100</sup> including “what he wanted to happen inside the courtroom, and how he wanted his lawyers to represent him.”<sup>101</sup> The defense team’s client-dictated trial strategy, Mack notes, “clashed directly with the professional self-image of the black bar.”<sup>102</sup> That, in turn, may have had a negative impact on how white judges, lawyers, and jurors in the courtroom perceived Davis and his defense team. Here, Davis and his co-counsel found that racial boundaries remained fixed in the courtroom. Confined to a Southern courtroom, he adds, the team also collided with “the customs of courtroom space that marked black people as inferior” and that tolerated “racial

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96. *Id.*

97. *Id.* at 161.

98. *See id.* at 163–65.

99. *See id.*

100. *Id.* at 167.

101. *Id.* at 165.

102. *Id.* at 168.

epithets voiced in open court by . . . [white] lawyers and judges.”<sup>103</sup> Mack stresses that Davis and the defense team struggled at trial “simply to be treated like equal[s] inside the courthouse” and clashed with the judge and prosecutor, particularly over “racial etiquette” and “racial language” inside the courtroom.<sup>104</sup> Bluntly put, the *Herndon* trial displayed an “inverted image” of the progress of the black bar in Depression-era civil rights courtrooms.<sup>105</sup> It also put the externally desired performance by the black attorneys at odds with the wishes of their client, revealing a possible incentive for black lawyers to “exploit” competing images and narratives of racial character and culture in the courtroom. The fissures underlying this reversal of racial progress reemerged during the postwar era of integration.

## 2. *Postwar Integration*

Mack reveals that Thurgood Marshall and other black lawyers were “self-conscious about showing whites, including the justices of the Supreme Court, how they might navigate” the postwar integration of public accommodations engineered by the NAACP.<sup>106</sup> More broadly, according to Mack, black civil rights lawyers appreciated the “immense symbolic importance” of black lawyers’ assimilation into the public realm of “governmental agencies, blue-ribbon commissions, civic associations, law firms, and the judiciary.”<sup>107</sup> Yet these benefits highlighted “an enduring paradox of group identity”: they were achieved because black civil rights lawyers were seen to represent a “larger racial group” or black community, but they became “possible only because of the increasing distance between the lawyers and the communities they still claimed to represent.”<sup>108</sup> This contradiction entangled even Thurgood Marshall, who had a sometimes difficult relationship with the NAACP’s rank-and-file constituency of local chapters in small towns and rural counties. But in the early 1960s, when the alternative idea of “community control” directed activist “representatives” of minority groups to be “closer to the people themselves,”<sup>109</sup> the contradiction eased.

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103. *Id.*

104. *Id.* at 168–70.

105. *Id.* at 170.

106. *Id.* at 235.

107. *Id.*

108. *Id.* at 236.

109. *Id.*

Ultimately, however, Mack insists that the question of representativeness—of who exactly can represent a minority group—remains “without an answer.”<sup>110</sup> Of black civil rights lawyers, he asks: “In a world where society required them to have professional bonds with whites and still stand in for blacks, who exactly did they represent in an era where group loyalty still played an unmistakable role in public life?”<sup>111</sup> Mack shows how the nineteenth-century idea of the “representative colored man”<sup>112</sup> and the recurring dilemma of racial representation in the courtroom faced by civil rights lawyers in the twentieth century both involve the basic problem of lawyer authenticity in representing black clients and communities.<sup>113</sup> The next Part searches for new answers to old questions about civil rights and the American politics of race.

## II. THE IMPACT OF “ACTING WHITE” ON TODAY’S BLACK CIVIL RIGHTS LAWYERS

Mack describes how such pioneering civil rights attorneys as Thurgood Marshall, Charles Hamilton Houston, and Pauli Murray found themselves in the difficult bind of demonstrating that they were as different as possible from other Blacks in order to gain the trust of white lawyers and judges, but also “as much like the masses of black people as possible” in order to be perceived as “authentic” representatives<sup>114</sup> by Blacks and Whites alike. In *Acting White?*, Professors Devon Carbado and Mitu Gulati focus on a largely similar conflict for today’s black lawyers and professionals who work within majority-white institutions.

### A. From “Representing” to “Performance”: Articulating the Modern Demands of Identity Work

Expanding upon the insights from their earlier scholarship on workplace performance,<sup>115</sup> Carbado and Gulati explicate how black professionals today

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110. *Id.* at 264.

111. *Id.* at 236.

112. *Id.* at 267.

113. *Id.* at 267–69.

114. *Id.* at 5.

115. E.g., Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004); Carbado & Gulati, *supra* note 12.

struggle with the “double-bind racial performance” of proving to Blacks that they are racially authentic and to Whites that they are racially conforming.<sup>116</sup> They characterize the conflict as a need “to demonstrate that one is black enough from the perspective of the supporting cast and white enough from the perspective of the main characters.”<sup>117</sup> They focus, in particular, on the demand and need for black lawyers to behave, or as Carbado and Gulati say, “work their identities,” in ways that make them racially palatable to Whites. Much as Mack notes that Thurgood Marshall often would “assume a deep southern accent and an extremely courteous persona when dealing with opposing lawyers in the South,”<sup>118</sup> Carbado and Gulati contend that success for Blacks in predominantly white workspaces requires them to engage in similar performances by downplaying their racial identity and background and working hard to make Whites around them comfortable. At the same time, Carbado and Gulati highlight how black professionals must often simultaneously endure a potentially contradictory demand to be “black enough.”

In all, Carbado and Gulati articulate and provide examples of six strategies that racial outsiders often employ to effectively manage their identities within the workplace: (1) “racial comforting”;<sup>119</sup> (2) “strategic” or “partial passing”;<sup>120</sup> (3) “exploiting stereotypes”;<sup>121</sup> (4) “providing discomfort”;<sup>122</sup> (5) “buying

116. CARBADO & GULATI, *supra* note 2, at 1; *id.* at 4 (using President Obama as an example of a black man who “successfully performed the racial double bind, persuading white voters that he was not ‘too black’ and black voters that he was ‘black enough’”).

117. *Id.* at 1.

118. MACK, *supra* note 1, at 65-66.

119. A classic example of racial comforting is the behavior of a worker of color who laughs at or does not complain about racially insensitive jokes or comments. CARBADO & GULATI, *supra* note 2, at 27-28.

120. “[C]omplete passing” involves certain minorities convincing others that they are “insiders”—for example, people of color and gays and lesbians convincing others that they are white or straight, respectively. *Id.* at 29. By contrast, an example of strategic or partial passing is the behavior of a person who changes the racial- or ethnic-sounding names on her résumé for fear that the names will convey negative racial stereotypes or otherwise identify her as the “wrong kind” of minority. *See id.* at 29-33; *see also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1306-08 (detailing how discrimination on the basis of race-salient characteristics leads some minorities to adopt passing strategies).

121. CARBADO & GULATI, *supra* note 2, at 33. This strategy is consistent with Professor Kenji Yoshino’s concept of “reverse covering,” or playing up certain stereotypes to one’s advantage at work. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 780 (2002). Carbado and Gulati provide the example of a Korean American who exploits the stereotype that Koreans are

back”;<sup>123</sup> and (6) “selling out.”<sup>124</sup> Two of these strategies, “racial comforting,” which refers to the actions that minorities take at work to “make insiders feel comfortable with their outsider status,”<sup>125</sup> and “selling out,” which refers to the behavior of minorities who legitimize the potentially discriminatory actions of insiders by lending insiders their support, are relevant to our analysis about the future of civil rights lawyers.

More than merely categorizing how outsiders negotiate norm-laden interactions in predominantly white environments, Carbado and Gulati articulate how pressures to engage in identity performances that may avoid the imposition of negative stereotypes upon them are a greater burden for workers of color. Specifically, Carbado and Gulati expose how so-called colorblind norms, which presume that social and workplace norms are not “raced,” require people of color to constantly monitor their own behavior to minimize the salience of their race in their daily work interactions.<sup>126</sup> As *Acting White?* demonstrates, much like the black civil rights attorneys of *Representing the Race*, Blacks who wish to fit into and succeed within majority-white spaces today have strong incentives to show that they are “safe” or racially palatable Blacks who contravene racial stereotypes.

At the same time, however, *Acting White?* suggests one major difference in performance within this double bind between black professionals of the past and present. This primary difference, Carbado and Gulati posit, is that when today’s black professionals work their identities to distinguish themselves from “the masses of black people,”<sup>127</sup> as Mack would say, and thus gain acceptance and trust from Whites, they are no longer viewed as merely engaging in deliberate or strategic performances. Instead, they are perceived as just engaging in “normal,” nonraced behavior.<sup>128</sup> Carbado and Gulati explain that,

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hardworking and technically inclined to ensure a preferred assignment on a workplace team. CARBADO & GULATI, *supra* note 2, at 33.

122. A person who follows the path of “providing discomfort” consistently chooses to challenge unfairness against outsiders at work. CARBADO & GULATI, *supra* note 2, at 33-34.
123. Similarly, a person who works her identity by “buying back” may attempt to make amends once her peer outsiders alert her to the fact that her “performance of comfort [has] been costly to their community.” *Id.* at 34-35.
124. *Id.* at 34. A clear example of “selling out” is the behavior of a black person who agrees with white colleagues’ position that African Americans are intellectually inferior beings.
125. *Id.* at 27.
126. *Id.* at 38-39.
127. MACK, *supra* note 1, at 5.
128. CARBADO & GULATI, *supra* note 2, at 38-39 (“The reason the racial composition of the association matters relates to the one-directional way in which the color-blind norm works. The color-blind norm does not require whites to avoid other whites or to associate with



although in some cases, such “normal” performances may actually represent a black professional’s presentation of his or her authentic self, in many cases, it does not.<sup>129</sup> In other words, they assert that what was once understood as black professionals “acting white” to get ahead or gain entrance to power is now generally viewed as simply acting right—as simply being—in today’s society. Tied into that understanding is the view that any action, dress, music, art form, or speech that is racially associated with blackness is nonconforming and “wrong” behavior.<sup>130</sup> The end result is that the experiences of Whites in society become normative, while other experiences become abnormal or nonstandard. As Carbado and Gulati observe, “Substantively, anything an African American says [or does] that diminishes the extent to which her employer or her co-workers perceives her to be black is ‘talking [or being] white.’”<sup>131</sup>

To illustrate their points about the demands for Blacks to manage their identities in ways that show that they are black enough without being too black, Carbado and Gulati point to several examples from then-Senator Barack Obama’s campaign for the presidency. Speaking of Obama’s campaign efforts, the two authors contend that, so long as Obama “avoid[ed] being racially pigeonholed,” he was viewed by Whites as raceless, meaning his “black” skin was noted, but he was praised and framed as a person who transcended race; in

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people of color. This norm does, however, implicitly require people of color to avoid other people of color (the negative racial duty) and to associate with whites (the affirmative racial duty). Understood in this way, the color-blind norm operates as a color conscious burden. Color blindness, therefore, does not actually mean race neutrality. In the context of professional institutions, the norm racially allocates identity work, requiring people of color, but not white people, to think and be careful about their racial associations. The question of whether the workplace norm of color blindness is violated turns on whether people of color associate with each other or with whites. Consequently, white-with-white and white-with-people-of-color associations are perceived as color blind. However, people of color with people-of-color associations will likely be perceived as color conscious.”).

129. *Id.* at 40 (“Identity performances can result in people of color compromising their sense of identity. This is not to say that people have true identities or essences. . . . The point . . . is that there are moments in which a person’s performance of identity contradicts some normative or social image that person has of themselves. Dismissing this ‘sense of self’ as false consciousness, obscures the extent to which each of us makes daily decisions based on who we think we are at any given moment. Compromising that sense of self—over and over again—can be painful.”).

130. *See, e.g., id.* at 48 (“Within majority-white workplaces, talking white is more advantageous to an employee than talking black.”); *id.* at 71-78 (discussing the claim of a black woman, Tyisha, who is not hired by a firm but who, unlike the other four black women who were hired by a firm, has a black-sounding name, wears her hair in dreadlocks, is a single mom, and lives in the inner city, among other things, and stating that “Tyisha’s Working Identity is a stronger racial prime, that is, a stronger catalyst, for the triggering of negative racial stereotypes, than the working identities of the other four black women”).

131. *Id.* at 17.

this way, he became a symbol of why race no longer mattered in the country.<sup>132</sup> Part of President Obama's framing by others as raceless was dependent upon how he could be distinguished and distanced from black leaders who have been viewed as being "too black," such as the Reverend Jesse Jackson and the Reverend Al Sharpton.<sup>133</sup> Carbado and Gulati write:

But even if white Americans were not experiencing Obama in terms of racial cover, they were certainly experiencing him in terms of racial palatability. Nothing in Obama's comments [at the Democratic National Convention in 2004] hinted at racial division, racial antagonism, or racial conflict. Indeed, nothing in his speech hinted at civil rights. This was not the Reverend Jesse Jackson. This was not Congressman John Lewis. This was not Al Sharpton. Then-presidential hopeful, Joseph Biden, pretty much said as much. He described Obama as "the first mainstream African-American who is articulate and bright and clean and a nice-looking guy."<sup>134</sup>

In essence, Obama's success was based in part on the way he could be viewed as an exception to his race. As Carbado and Gulati intimate, in today's society, this view of "good Blacks" as exceptional is exactly what is used to blame "bad Blacks" (those who are underprivileged and excluded from power and opportunity) for their subordinated positions. The end result, they point out, is that civil rights strategies and protections end up centering on, and disproportionately benefitting, those identified as "good Blacks"—much like during the civil rights era described in *Representing the Race*.

For example, in speaking about racial disparities within the criminal justice system, and in this particular instance racial profiling, Carbado and Gulati assert that, ironically, current civil rights strategies tend to work only for the most privileged of Blacks—a fact they note is reminiscent of "the strategy the NAACP . . . employed in the 1930s and 1940s to determine which criminal procedure cases to litigate."<sup>135</sup> Specifically, Carbado and Gulati argue that, in today's society, whether

a person's racial profiling story has traction turns on whether that person is perceived to be a "good black." There is a perversity to this: blacks who are the most vulnerable to incarceration because their

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<sup>132</sup>. *Id.* at 5.

<sup>133</sup>. *Id.* at 6.

<sup>134</sup>. *Id.*

<sup>135</sup>. *Id.* at 108.

experience with racial profiling provided the police with evidence of criminality (“bad blacks”) are the least likely to engender public sympathy when they assert they have been racially profiled. They are unlikely to ever have either an opportunity or platform to complain. By contrast, [good Blacks are] able to mobilize attention around [their] sense of victimization, notwithstanding that [they are] less vulnerable than most African Americans to both experience racial profiling and to be incarcerated.<sup>136</sup>

Offering one example of the harmful consequences of black exceptionalism, Carbado and Gulati critically analyze the ACLU’s campaign against racial profiling. They question the campaign’s choice to make its points about the harms of racial profiling by using only images of black and brown men in suits to show the victims of racial profiling and stressing only those stories of “respectable” black and brown men like teachers who are wrongfully profiled by the police. Such anti-profiling tactics, they contend, essentially send the message that the evil of racial profiling is not that it involves an immoral use of race as a proxy for criminal activity, but rather that it “results in the persecution of innocent people based on their skin color.”<sup>137</sup>

Even as Carbado and Gulati illuminate the demands that are placed on Blacks to engage in performances of racial palatability, they also make it clear that such performances do not cement Blacks who work to comfort Whites as racially safe at all times. In so doing, they demonstrate how Obama’s general framing as raceless both during and after his campaign has been fluid rather than fixed. They explain that when Obama has suggested that race is salient in our society, he has been marked as other—as black again, such as when he spoke out about how “the Cambridge police acted stupidly in arresting somebody [Harvard University Professor Henry Louis Gates, a black man] when there was already proof that they were in their own home.”<sup>138</sup> These proclamations by Carbado and Gulati are confirmed by Professor Charles

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136. *Id.* at 100.

137. *Id.* at 108 (quoting David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU (June 7, 1999), <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways>).

138. *Id.* at 98. Gates was arrested at his Cambridge, Massachusetts, home in July 2009. Upon returning from an overseas trip, Gates attempted to force open the jammed front door to his home. A neighbor asked Lucia Whalen, who worked nearby, to call 911; Gates was arrested and charged with disorderly conduct after a verbal confrontation with police who responded to the scene. See Michele McPhee, Dan Harris & Dean Schabner, *Prominent Black Scholar Henry Louis Gates, Jr. Arrested After Racism Charge*, ABC NEWS, July 20, 2009, <http://abcnews.go.com/US/story?id=8131953>.

Ogletree, who makes a similar observation, noting that “President Obama’s two-minute response to what seemed an innocuous question had the unanticipated effect of *blackening* him.”<sup>139</sup>

Additionally, Carbado and Gulati explain the need for today’s black professionals to signal also that they are “black enough.” To stress this point, the two authors use President Obama again as one of their examples, revealing how even mundane behavior can be viewed as evidence either of his being sufficiently black or his being “the kind of black person who is not ‘black enough.’”<sup>140</sup> For example, Obama’s support of the University of North Carolina Tar Heels basketball team over the Duke Blue Devils, a team “long . . . accused of pursuing only those black players who some argue ‘act white,’”<sup>141</sup> could have been influenced by a fear that siding with Duke would have marked him as not “black enough.” In fact, President Obama himself has acknowledged the double bind in which he and other black professionals today routinely find themselves. In his speech concerning what became known as the Reverend Wright controversy, then-Senator Obama declared, “At various stages in the campaign, some commentators have deemed me either ‘too black’ or ‘not black enough.’”<sup>142</sup>

Finally, Carbado and Gulati demonstrate how what is traditionally understood as race or sex per se is not as important in the workplace as a willingness to engage in assimilative conduct. In their example, a law firm hires four black associates whose names, educational backgrounds, appearance, and conduct—including their interests in sports such as golf and tennis and their choices to marry professional men, interracially for two of them—are consistent with downplaying their race and gender difference from white associate candidates. The firm does not, however, hire the fifth black female associate candidate, Tyisha, who is a single mother with an ethnic-sounding name, wears ethnic clothing and hairstyles (locks<sup>143</sup>), belonged to black political

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139. CHARLES OGLETREE, JR., *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA* 55 (2010).

140. CARBADO & GULATI, *supra* note 2, at 9.

141. *Id.* at 8.

142. *Id.* at 12–13 (quoting Barack Obama, *A More Perfect Union* (Mar. 18, 2008) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=88478467>)). The controversy concerned inflammatory remarks in sermons given by Obama’s pastor, the Reverend Jeremiah Wright.

143. Locks consist of sections of hair that are “permanently locked together and cannot be unlocked without cutting.” Shauntae Brown White, *Releasing the Pursuit of Bouncin’ and Behavin’ Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 INT’L J. MEDIA & CULTURAL POL. 295, 296 n.3 (2005); *see also* Angela Onwuachi-Willig, *Undercover Other*,

organizations in college, and is uninterested in playing golf or tennis.<sup>144</sup> Here, Carbado and Gulati explain, Tyisha is left without a legal remedy for this job rejection, not just because the hiring of four other black women will work to shield the firm from race and gender (including intersectional) discrimination claims, but primarily because courts have not yet begun to entertain claims based on the failure of minority workers to assimilate to translucent “white” norms—in other words, claims based on whether candidates have acted white enough.<sup>145</sup>

As Carbado and Gulati demonstrate, understanding the costs of identity work is very important because civil rights attorneys, as well as the public more generally, need to understand what it means to represent the race in a contemporary context. This means both understanding what race is and how it is practiced today. In the end, Carbado and Gulati leave their readers with two points that shape our analysis below: (1) that the reality of race and inclusion in society has shifted such that there are significant burdens placed on outsiders to assimilate and ignore the salience of race; and (2) that any future civil rights strategies must account for the conflicting messages and challenges that will continue to arise as a result of varying intragroup and intergroup identity performances. Equally important, Carbado and Gulati’s model causes us to question how law and lawyers should change to meet the challenge of discrimination, which no longer operates as a simple question of black or white.

*B. The Umbrella of the Double Bind, Dual Representation, and Double Consciousness: The More Things Change, the More They Stay the Same?*

The conception of the double bind or dual representation described in *Representing the Race and Acting White?* is different from the “twoness” of blackness defined by preeminent twentieth-century black scholar W.E.B. Du Bois in his seminal work, *The Souls of Black Folk*.<sup>146</sup> But the very notion of the

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94 CALIF. L. REV. 873, 873 n.3 (2006) (providing a definition for locks); Anita M. Samuels, *Rediscovered Cornrows*, N.Y. TIMES, July 30, 1995, <http://www.nytimes.com/1995/07/30/style/noticed-rediscovered-cornrows.html> (defining locking as “allowing the hair to mat”). According to White, the term “loc” or “lock” is preferred to the term “dreadlock,” as “the term dreadful was used by English slave traders to refer to the Africans['] hair, which had probably loc’d naturally on its own during the Middle Passage.” White, *supra*, at 296 n.3.

144. CARBADO & GULATI, *supra* note 2, at 74-77.

145. *Id.*

146. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 8 (Henry Louis Gates, Jr. ed., 2007) (1903). Du Bois became the first African American to earn a doctorate from Harvard University in 1895 and also was a cofounder of the NAACP. See Kwame Anthony Appiah, *Battling with Du Bois*,

double bind or dual representation as a core component of black identity is, in many ways, another variant of Du Bois's idea of "double-consciousness."<sup>147</sup> Identifying double consciousness as a fundamental part of black identity, Du Bois wrote:

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.<sup>148</sup>

For Du Bois, part of the essence of being black was the double bind of both striving for belonging and being forced into exclusion in one's own country. Du Bois explained that, in encountering this conflict, Blacks were forced to first understand how those in power—Whites—perceived them and then had to react and respond accordingly. This process ultimately ran contrary to the attainment of self-conscious personhood. Additionally, in a commentary on fellow black leader Booker T. Washington, Du Bois explained how racial comfort strategies—behaviors and acts that do not threaten the status quo and are intended to make Whites comfortable when they are around Blacks—may help make Blacks who engage in those strategies, such as Washington, successful. Specifically, Du Bois described Washington as a man who "put enthusiasm, unlimited energy, and perfect faith" into "[h]is programme of industrial education, conciliation of the South, and submission and silence as to civil and political rights" and "won the applause of the South."<sup>149</sup>

Finally, Du Bois highlighted what he saw as the inevitable negative consequences of employing racial comfort strategies, in that true equality could not be reached by Blacks compromising higher aims in life to "survive . . . [by] submission" because "a silent submission to civic inferiority . . . is bound to sap

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N.Y. REV. BOOKS, Dec. 22, 2011, <http://www.nybooks.com/articles/archives/2011/dec/22/battling-du-bois> (reviewing LAWRIE BALFOUR, *DEMOCRACY'S RECONSTRUCTION: THINKING POLITICALLY WITH W.E.B. DU BOIS* (2011); ROBERT GOODING-WILLIAMS, *IN THE SHADOW OF DU BOIS: AFRO-MODERN POLITICAL THOUGHT IN AMERICA* (2009)).

147. DU BOIS, *supra* note 146, at 3.

148. *Id.*

149. *Id.* at 21–22.

the manhood of any race in the long run.”<sup>150</sup> Thereafter, Du Bois stressed the second problem that he saw as arising when Blacks engaged in comfort strategies for the benefit of Whites and made them feel comfortable and safe: the placement of blame about Blacks’ subordinated status solely upon Blacks, without any recognition of structural and historical racism and their effects on the plight of Blacks. Du Bois poignantly wrote:

In his failure to realize and impress this last point, Mr. Washington is especially to be criticised. His doctrine has tended to make the whites, North and South, shift the burden of the Negro problem to the Negro’s shoulders and stand aside as critical and rather pessimistic spectators; when in fact the burden belongs to the nation, and the hands of none of us are clean if we bend not our energies to righting these great wrongs.<sup>151</sup>

This review of Du Bois’s work in *The Souls of Black Folk* is powerful in that it reveals for us, perhaps, how little we have traveled on the path to racial equality over the past century. After all, more than one hundred years after the book’s initial publication, Carbado and Gulati are still addressing what they have defined as a double bind for Blacks who live and work in white spaces.

Unlike Du Bois, however, whose work focused on “the contradiction of black Americans being citizens without the full rights accorded to citizens,”<sup>152</sup> and unlike Mack, whose later work does the same on many levels, Carbado and Gulati explain a new form of “double-consciousness” for black professionals in the United States. To Carbado and Gulati, today’s double bind is different because it is no longer premised upon and constructed in a society in which all Blacks are essentially excluded from circles of opportunity, but instead upon a society in which a few Blacks are certain to be included.

Key to understanding the arguments in *Acting White?* is an acknowledgement of how discrimination can occur even when some Blacks are included. Comprehending this point, in turn, requires an understanding of the various factors that are more commonly being used to define and identify race in a country that insists that race is no longer relevant in structuring people’s lives and opportunities.<sup>153</sup> Carbado and Gulati explain that, in today’s

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<sup>150.</sup> *Id.* at 25–26.

<sup>151.</sup> *Id.* at 29.

<sup>152.</sup> Lewis R. Gordon, *Philosophical Anthropology, Race, and the Political Economy of Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 145, 148 (2004).

<sup>153.</sup> See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (“[P]ost-racialism in its current iteration is a twenty-first-century ideology that reflects a belief that due to the

workplace, race is not marked solely by physical indicators such as skin color. Instead, race is also defined by how one acts, which may include racially associated ways of being, such as how one dresses, how one styles one's hair, how one speaks, and how one votes.

That Carbado and Gulati make such assertions about how race is defined is not surprising. Scholars such as Professors Camille Gear Rich, Wendy Greene, and Ariela Gross have made significant contributions to the subject. For instance, Gross has shown that performance and behavior have historically played a prominent role in determining race in the United States. Gross explains that, in nineteenth-century Southern trials that involved decisions about the whiteness of individuals, a racially contested person's exercise of white citizenship's privileges and acceptance by recognized Whites within the community often played a central role in courts' determinations whether an individual was white and thus deserved the privileges of whiteness.<sup>154</sup> Similarly, in more contemporary contexts, both Greene and Rich have contended that "racially and ethnically coded" indicia such as hairstyles and other aesthetic choices may be used to categorize people by race, whether or not they intend to signal such a racial identity.<sup>155</sup> It is not surprising that such performances would continue to play a (larger) role in determining race—or rather, in determining what race signifies in terms of inclusion or exclusion from circles of power and opportunity today. As Professor Kenji Yoshino explains, the notion of racial acceptability has changed in meaningful ways over

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significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action. According to post-racial logic, the move is to effectuate a 'retreat from race.'" (footnotes omitted) (quoting DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (1993))); see also Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 31-39 (2011) (analyzing the rise of postracialism and its connection to earlier societal commitments to colorblindness); cf. Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 967-77 (2010) (pointing out that post-race-like perspectives have actually been advanced within constitutional equal protection jurisprudence since at least the nineteenth century).

154. ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 48-58 (2008); see also Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 156-57 (1998) (describing the performance of white manhood and white womanhood in trials determining a person's race during the nineteenth century).
155. D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got To Do with It?*, 79 U. COLO. L. REV. 1355, 1384-93 (2008); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1158-66 (2004).



time, reaching “a transitional moment in how Americans discriminate,” such that “individuals no longer need[] to *be* white, male, straight, Protestant, and able-bodied; they need[] only to *act* white, male, straight, Protestant, and able-bodied.”<sup>156</sup> In other words, unlike in the past, when all or nearly all minorities were treated as complete outsiders, those who perform their identities appropriately—that is, as a middle-class, heterosexual, able-bodied, Protestant, white male—are viewed as having the opportunity to achieve a level of belonging.

Herein, Carbado and Gulati attest, lies the difference. They argue:

The reality today, therefore, is that most firms want to hire *some* African Americans. The question is, which ones? . . . Employers can screen their application pool for African Americans with palatable working identities. These African Americans are not “too black”—which is to say, they are not racially salient as African Americans. Some of them might even be “but-for” African Americans—“but for” the fact that they look black, they are otherwise indistinguishable from whites. From an employer’s perspective this subgroup of African Americans is racially comfortable in part because they negate rather than activate racial stereotypes. More generally, the employers surmise that these “good blacks” will think of themselves as people first and black people second (or third or fourth); they will neither “play the race card” nor generate racial antagonism or tensions in the workplace; they will not let white people feel guilty about being white; and they will work hard to assimilate themselves into the firm’s culture.<sup>157</sup>

Still, the question remains: What do these new—or, more accurately, modified—demands mean for the next generation of black civil rights attorneys? We provide a few of our thoughts on this question in Part IV, but before doing that, in Part III, we first define what we mean by “civil rights lawyers,” both today and in the future, and detail the differences that the pressure to work one’s identity creates between the professional lives of black civil rights attorneys of the past and present.

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156. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 21–22 (2006); see also MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 66 (2d ed. 1994) (“[R]acial dictatorship is the norm against which all U.S. politics must be measured. The centuries of racial dictatorship have had . . . [the] consequence[] . . . [of] defin[ing] ‘American’ identity as white, as the negation of racialized otherness.”).

157. CARBADO & GULATI, *supra* note 2, at 2.

### III. THE INFLUENCE OF POSTRACIALISM ON BLACK CIVIL RIGHTS LAWYERS

In this Part, we examine more deeply the dissimilarities between the experiences of black civil rights lawyers from the past and the present. We first identify the tensions in defining the phrase “civil rights lawyers” today and then specify what we mean in this Book Review when we use the phrase. Thereafter, we analyze two distinctions between the two generations of lawyers: (1) the different symbolic meanings that were and are attached to the existence of black civil rights lawyers of the past and present; and (2) the larger number of divisions and the deeper intensity of these divisions within the black population today than in the past.

#### A. *Who Is Today’s Civil Rights Lawyer?*

The first difficulty confronting present and future communities of civil rights activists is how they will define themselves. What type of legal practice and work fits under the umbrella of civil rights today? This question is complicated by two factors. The first is what Professor Audrey McFarlane has described as the conversion of an “overt, explicit system” in which “race was a primary (but not the only) method used to allocate citizenship, rights, and resources”<sup>158</sup> to a civil rights system that purportedly protects against discrimination but does not necessarily do so—and in fact, may cause discrimination.<sup>159</sup> The second is the growth of rights movements related to gender, sexuality, immigration status, wealth, and intersectional classes involving any or all of these identity categories that have characterized themselves as part of an expanded civil rights movement.

#### 1. *The New Civil Rights Lawyer?*

For the purposes of our Book Review, we define civil rights lawyers according to the term’s traditional meaning—that is, progressive lawyers who are working to undo oppressive structures of government, policy, law, and education that make Blacks (and other disfavored groups, as discussed in

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158. Audrey G. McFarlane, *Operatively White? Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 LAW & CONTEMP. PROBS. 163, 190 (2009).

159. See *id.* at 190-95.

Subsection III.A.2) second-class citizens.<sup>160</sup> In today's "postracial" society, however, some argue that identifying civil rights lawyers and work is more complicated. They contend that it may have been easy to name which lawyers were on the side of advancing the civil rights of subordinated Blacks during the periods that Mack describes in *Representing the Race*. Then, arenas like the criminal justice system were undeniably organized by a racial caste system in which black jurors were excluded, confessions by black defendants were frequently coerced, and black defendants routinely suffered extrajudicial vigilantism at the hands of Whites. But today, one might argue, it is less easy to identify what types of lawyers are civil rights lawyers. Does a prosecutor, for example, engage in civil rights work in the same way that a criminal defense attorney does?

Indeed, today, black prosecutors are more commonly describing their choice of employment as civil rights work designed to protect black victims from largely intraracial crimes. Professor James Forman, Jr., recounts precisely these types of comments from black prosecutors whom he met on the other side of the table when he was a public defender:

When I was a public defender in D.C., my African American counterparts in the U.S. Attorney's Office often informed me that they had become prosecutors in order to "protect the community." Since I started teaching, I have met many students with prosecutorial ambitions who feel the same way. And they have a point: If stark racial disparities within the prison system motivate mass incarceration's critics, stark racial disparities among crime victims motivate tough-on-crime African Americans. Young black men suffer a disproportionate amount of both fatal and nonfatal violence.<sup>161</sup>

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160. Such attorneys populate traditional identity-group-focused organizations such as the NAACP Legal Defense Fund, Equal Rights Advocates (a women's equality organization), Mexican American Legal Defense and Educational Fund, and Asian American Legal Defense and Education Fund, as well as newer, broader-based organizations, such as the Equal Justice Society and the Lawyers' Committee for Civil Rights Under Law. Other attorneys, however, have gone on to pursue civil rights work in private practice, many with a focus on cases challenging police misconduct.

161. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 42-43 (2012). In his dissent in *City of Chicago v. Morales*, 527 U.S. 41 (1999), Justice Thomas expressed a similar argument, stressing that intraracial crime in black neighborhoods has forced law-abiding residents to become "prisoners in their own homes." *Id.* at 99; *see id.* at 100-02, 114-15; *see also* Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 997-99 (2005) (arguing that Justice Thomas's criminal law

Similarly, black conservatives such as Ward Connerly (though not a lawyer) have characterized their advocacy against affirmative action as civil rights work or have inserted the phrase “civil rights” into the names of their organizations, such as the American Civil Rights Institute.<sup>162</sup>

Though the actions of those such as Connerly have made it more difficult for the next generation of civil rights lawyers to reach a true consensus about how to define themselves and their causes—not that this task was easy in previous generations, when there was also a diversity of views about tactics and strategy<sup>163</sup>—in the context of race, we define the term “civil rights lawyers” in a very traditional way. The attorneys we reference are lawyers who are advancing race-based civil rights from a liberal or progressive standpoint, meaning that they support antidiscrimination laws, affirmative action, the elimination of racial disparities, and the work of public defenders within the criminal justice system.

## 2. *The New Civil Rights?*

That said, we also define civil rights in ways that extend beyond race, embracing rights movements on issues such as sex, sexuality, disability, and immigration. Here, we contend, the experiences of black female attorneys like Pauli Murray are instructive because they highlighted, early on, the relevance of intersectionality<sup>164</sup> and the connectedness of various types of oppression in rights struggles. Like Murray, we believe that the new civil rights encompass something apart from the “conventional binaries of identity—black and white, heterosexual and homosexual.”<sup>165</sup> This reality differs from that of past black civil rights attorneys, who neither had to truly “represent” multiple group

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jurisprudence articulates a black conservative perspective on criminal law that promotes a focus on the victim rather than the perpetrator).

162. According to its website, the American Civil Rights Institute is “a nationally recognized civil rights organization created to educate the public about racial and gender preferences.” See AM. CIVIL RIGHTS INST., <http://www.acri.org> (last visited Dec. 5, 2012).

163. See generally TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011) (challenging the myth of civil rights leaders’ and communities’ consensus on strategies and tactics).

164. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152-60; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-45 (1991). For more on the point that larger identity groups should not be understood to be coherent monoliths in which other categories such as gender, sexuality, and class do not matter, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585-89 (1990).

165. MACK, *supra* note 1, at 215; see *supra* Section I.C.

interests, nor had to significantly consider how other identity-based categories operate within, rather than just across, racial groups.

Now more than ever, black civil rights attorneys struggle to maintain authenticity and distinction while at the same time meeting the need for coalition building across race, sexuality, class, and other identity-based categories. The world of representation has become far more complicated and more inclusive. For one thing, civil rights representation is no longer limited to conversations within a black/white paradigm. There are many identity groups with unique histories of disenfranchisement and pressing needs for civil rights advocacy. For example, in the very recent history of the United States alone, policies related to the treatment of undocumented workers, tactics employed against persons presumed to be Muslim or Arab, and attempts to limit the constitutional rights and status of gays and lesbians have triggered significant calls for new types of civil rights reforms.<sup>166</sup>

Today, civil rights lawyers must not only mitigate intergroup conflicts arising from the increasing number of groups who claim a need for representation, nor must they solely do so in ways that take advantage of the various opportunities to build intergroup coalitions; but they also must address intragroup complications that arise from representation of the multiple constituencies that exist within racial groups. First, as Professor Catherine Smith explained about the significance of coalitions to the new civil rights movement in her article *Queer as Black Folk?*, modern forms of representation would benefit by focusing on a broader commitment to antisubordination instead of the narrow past commitment to addressing disadvantage experienced by one group.<sup>167</sup> For example, with regard to the claimed differentiation between black rights and gay rights, one could imagine a

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166. See, e.g., Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. C.R. & C.L. 233, 237 (2007) (arguing in response to various proposals that “undocumented workers and their families in the United States should be legalized—granted lawful permanent residence status through an amnesty program”); Wadie Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 691 (2010) (arguing “that using informants to generate federal terrorism prosecutions in the absence of any articulable suspicion should end” and “call[ing] for a halt to the practice of allowing an individual untrained in law enforcement techniques to target individuals of an already suspect minority”); Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307, 309 (2010) (arguing “that there is strong precedent for children of same-sex couples to challenge the inequalities they face because of discrimination against their gay and lesbian parents”); Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. (forthcoming 2013) (offering a blueprint for an equal protection claim for children of same-sex couples).

167. Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 402-07.

modern approach that focuses not strictly on race and sexuality but on the compatible goals of eliminating racism and sexual subordination.<sup>168</sup> In our current climate, where obvious and intentional forms of discrimination have gone largely underground, such an approach may be a requirement rather than a choice for effective civil rights advocacy. Such moves toward solidarity will also be necessary because civil rights attorneys are frequently not members of the groups they represent.<sup>169</sup>

Additionally, civil rights lawyers should focus on the ways that the varying forms of subordination—racism, sexism, and homophobia, for instance—are mutually constitutive and reinforcing for a group's members.<sup>170</sup> After all, as Pauli Murray taught us, and as we later learned from Professor Kimberlé Crenshaw's theory of intersectionality, categories such as gender, class, sexuality, and religion—and the forms of discrimination premised upon these bases—intersect and overlap with racial identities to shape the experiences of varying subgroups within any larger group's members. No group of persons has a monolithic identity. Indeed, it was the neglect of intragroup differences that led black female attorneys such as Murray, who was deemed incapable of fully "representing" a community that she championed because its racial identity was constructed solely through the lens of masculinity and heterosexuality, to feel isolated from the black civil rights movement. In preparing today's civil rights advocates, part of their training must make this danger of forming exclusionary litigation strategies and campaigns real for them, by stressing that all groups are, in fact, multidimensional—encompassing of multiple subgroups—and capable of

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168. See *id.*; see also Darren Lenard Hutchinson, "Claiming" and "Speaking" Who We Are: *Black Gays and Lesbians, Racial Politics, and the Million Man March*, in *BLACK MEN ON RACE, GENDER AND SEXUALITY: A CRITICAL READER* 28, 31-35 (Devon W. Carbado ed., 1999). See generally Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 *STAN. J. C.R. & C.L.* 357 (2009) (making a similar point with regard to the loss of the Proposition 8 vote in California); Anthony E. Varona, *Taking Initiatives: Reconciling Race, Religion, Media and Democracy in the Quest for Marriage Equality*, 19 *COLUM. J. GENDER & L.* 805 (2010) (same).

169. See *infra* Subsection IV.B (highlighting the importance of white civil rights lawyers).

170. This claim has been advanced in the work of a number of legal scholars who have spoken of the operation of overlapping systems of subordination across identity categories, with a special emphasis on complicating our understanding of the effects of sexual orientation discrimination. See Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 *MICH. J. RACE & L.* 285 (2001); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 *HASTINGS L.J.* 1257 (1997); Francisco Valdes, Afterword, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors*, 75 *DENV. U. L. REV.* 1409 (1998).

being represented by any of their constituents or by those who move in solidarity with them.

That said, apart from the challenge of just defining who they are, today's civil rights lawyers, despite having more freedoms than their predecessors, also face additional complicated and subtle challenges. In the next Section, we address those challenges.

### *B. Is There a New Black?*

Black civil rights lawyers' identity performances as attorneys, both inside and outside the courtroom, have changed over time and may not serve the same social function as they did in the past. This Section explores how changes in social attitudes toward race and within the black community have affected civil rights lawyers' work.

#### *1. The Changing Meaning of Black Success*

Unlike black male civil rights attorneys from the past, today's black civil rights attorneys are not assured that their very presence as educated lawyers can serve as proof of what Blacks can achieve if racism or racial bias does not keep doors of opportunity closed to them. Instead, in contemporary American society, which many claim to be "postracial," or free from the burdens of racism, the presence of black civil rights attorneys may serve precisely the opposite function. For some audiences, it may serve as proof that racism is a thing of the past and that opportunity is available to all Blacks if they just work hard enough.

Although Blacks comprise only four percent of all attorneys overall,<sup>171</sup> successful black attorneys may serve as examples of a society full of abundant opportunities regardless of race. Indeed, today, in response to complaints of racism and racial discrimination, both explicit and implicit, it is not uncommon to hear a response that reflects a similar logic: "Racism is no longer an issue. For goodness' sake, we have a black President!"<sup>172</sup> In other words, in an ironic

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171. Carla D. Pratt, *Law School: Still a Good Investment for African-Americans*, NAT'L L.J., Sept. 3, 2012, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202569826512> (noting that Blacks constitute four percent of lawyers but nearly thirteen percent of the general population in the United States).

172. See generally Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 808 (2011) (explaining how "post-racialism constitutes a liberal embrace of colorblindness" and how it tracks colorblind ideology "in a way likely to limit progress toward increased racial equality"). Haney López explains that "Barack Obama's

twist, black civil rights attorneys now, in many ways, have become arguments against the very types of civil rights protections they advance in court. Additionally, as Du Bois warned during the early twentieth century, black civil rights attorneys of today have become arguments for why those Blacks who are viewed as “bad Blacks” (those who remain extremely disadvantaged and excluded in society) are to blame for their impoverished or otherwise disadvantaged situations.

Professor Paul Butler explains that he would frequently play the image of himself, a black prosecutor, against that of the black defendant during his trials. Butler describes the implicit message that he would often send to the jury through his mere presence as a *black* attorney.<sup>173</sup> Butler elegantly illuminates the power behind this particular performance of his racial identity with the following description:

“Good afternoon, ladies and gentlemen of the jury. My name is Paul Butler and I represent the United States of America.”

That’s how I always started my opening statement. Most of the jurors were black like me. They were usually old folks—the main group who bothered to show up for jury duty in career-obsessed DC. As they arrived at the courthouse in their Sunday go-to-church clothes, they seemed not so far removed from the time when their families migrated to DC from North Carolina in the 1950s. Sure, it was a bother to be called to jury duty, but it was also a privilege—they could remember when no black person ever received a jury summons. And then to

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election has inspired many to marvel that we now live in a ‘post-racial’ America. Obama himself seems to embrace this notion, not perhaps as a claim about where we are now, but as a political stance that dictates how best to approach society’s persistent racial problems.” *Id.* at 807; cf. Victoria L. Brown-Douglas, *Is It Time To Redefine the Negro Lawyer?*, 25 J. C.R. & ECON. DEV. 55, 67 (2010) (“It is exceptional and the exception. Having a President of the United States of America who is Black allows us to demonstrate to the world the capacity of a Black man. The danger, though, is that it convinces others that we are now in a post racial America and that Black people are no longer underserved and unrepresented. This poses a particular threat within the legal profession because lawyers of color still have many challenges to overcome.”).

173. See PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009). In fact, Butler describes how black male jurors may have similar incentives to perform their racial identities in ways that work to distance them from black male defendants. He asserts:

Some of my fellow prosecutors believe that in your average black male defendant case, you try to avoid black male jurors. The fear is they’ll be overly sympathetic. Others think just the opposite—a black man is just the juror you want, because he’ll want to distinguish himself from this black man on trial. He’ll prove he’s different by voting to convict the defendant.

*Id.* at 12.



actually be selected for a jury! They had figured the defendant was going to be black, and they were right. But what they hadn't expected was this other African American man in the courtroom.

There I was in a suit and tie, representing the United States. My presence reminded these jurors of the civil rights movement, the journey from slavery to freedom, and the promise of America . . . . These old black people would beam at me like they were thinking, *You go boy! You represent the United States of America!*

. . . .

Here's what they don't teach you in law school: As you, the black prosecutor, button your jacket and head back to the government table, you look at the jurors and then you glance back over at the defendant. You can't actually say these words, but this is what you mean: *Ladies and gentlemen of the jury, I am an African American. You are African Americans. The defendant over there—that's a nigger. Lock him up.*<sup>174</sup>

Additionally, much as Du Bois warned that comfort strategies of the sort Washington employed for Whites would "shift the burden of the Negro problem to the Negro's shoulders . . . when in fact the burden belong[ed] to the nation" and would allow Whites to "stand aside as critical and rather pessimistic spectators,"<sup>175</sup> Butler explains how his racialized performances as a black prosecutor in court worked to validate an unjust criminal justice system that targeted, profiled, and selectively prosecuted Blacks. Specifically, he contends that his presence and work as a prosecutor served a "legitimization function" for the criminal justice system by making it appear to be fair and thereby helping to uphold public trust in the system.<sup>176</sup> Butler observes:

It is significant that mass incarceration, and its attendant gross racial disparities, are occurring at a time when prosecutors' offices are more diverse than ever. . . .

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174. *Id.* at 57-58, 104-05. Butler makes a similar point while telling the story of his arrest based upon an angry neighbor's false accusations against him. Describing how he performed his identity for the jury—this time, as a defendant—Butler explains how he used clothing to signal that he was one of the "good Blacks" to the jury. He states: "In addition to carefully preparing my testimony, I made sure my haircut was conservative and my shoes were shined. I knew how to look like the kind of African American a jury would not want to send to jail." *Id.* at 16.

175. DU BOIS, *supra* note 146, at 29.

176. BUTLER, *supra* note 173, at 105-06.

. . . So how should jurors feel about the utter blackness of the criminal court? One reason I was hired was so that people with those kinds of concerns could see my skin. It was supposed to make them feel better. To folks who had questions about racial profiling or selective prosecution, my black body answered “Everything’s cool.”<sup>177</sup>

Butler’s revelation of the effect of the script that he would repeatedly follow as a black prosecutor who was working to send many black defendants to prison with convictions from black juries is a far cry from some of the effects of the performances that Mack describes in his book *Representing the Race*. For example, compare Butler’s reflections on his racialized performances in the courtroom with Charles Hamilton Houston’s representation of George Crawford, a black defendant whom Houston suspected bore some responsibility for his alleged crime, in 1933. At the end of the *Crawford* case, rather than drawing distinctions between Houston, a black attorney, and Crawford, the black defendant, the jurors and others in the white public viewed Houston as an example of what Blacks could become in a just society. As Mack explains, “As the lawyers gathered to await the jury’s verdict, Judge McLemore told his colleague that he had seen a ‘new vision of what can be and what ought to be the atmosphere of every criminal trial,’” and “[o]ne upper-class local woman reportedly confessed that ‘[a]fter hearing that brilliant man, I can no longer hold the views I previously held of the Negro.’”<sup>178</sup>

Yet today, any public defender, particularly a black one, must be aware of the implicit arguments that jurors may be making against a defendant because of the presence of a black prosecutor. Indeed, a black public defender must be especially aware of her own effect on jurors’ perceptions of her client because she may also serve as additional evidence of the “good Black”/“bad Black” distinction. For example, Jeff Robinson, a black male criminal defense attorney in Seattle and also a former state and federal public defender in the area, explains the tactics that he employs to get jurors to reject negative stereotypes or inferences about his black clients:

I ask myself, “How do I get jurors not to look at my client as an ‘other,’ as just another thug?” One of the things I do is I try to put myself out there in a way that connects the client to me, the educated black attorney. I try to change the dynamic of how they view us. “I’m not

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177. *Id.*

178. MACK, *supra* note 1, at 106, 108; see also Brown-Douglas, *supra* note 172, at 60–62 (asserting that the “New Negro Lawyer[s]” during the “Charles Hamilton Houston [p]eriod” “saw themselves as representatives of the aspirations of their people”).

what you thought I was. We are not what you thought we were.” If they like me or respect me when they go back to deliberate and think about whether to convict, I want them to feel a bit like they have to convict both of us—the client and me.

My basic strategy is I treat my clients with respect. Jurors see me engage with them as equals. I always put a paper and pad in front of my client, just like I have. When I finish questioning or cross-examining a witness, I walk over and speak with my client. I actually want to know what the client thinks and whether the client feels I should do anything more. However, it is rare that the client will ask me to continue a cross-examination when I think the cross should stop. It may be that all I say is “I think we’re done with this guy.” What is as important as the client’s opinion is the appearance of conversing with the client, looking at his note pad for information, including him in decisions as an equal during the trial. If they see me as a legitimate, intelligent, and good person, that rubs off on my client.<sup>179</sup>

Similarly, Song Richardson, a black female law professor at the University of Iowa College of Law who formerly worked as a state and federal public defender and as a partner at a boutique criminal defense firm, explains how she would use jury selection not only to get potential jurors to think about race and ask questions about race that they had never considered before, but also to get a sense of which jurors were comfortable talking about the issue:

In cases where I was concerned about race, I would address it during jury selection. My goal was to make race salient and to get the jurors talking about race. I was most interested in determining which jurors would be open to discussing the subject rather than judging them based upon their answers. I did not want to have jurors who ignored the issue or who asserted that race did not matter.<sup>180</sup>

Today, we continue to see a turn in the role of black civil rights attorneys (and other black professionals) who are being utilized as arguments against their race—or rather, against the subordinated position of much of their race. This theme unfolds not only in the everyday practice experience of black attorneys in criminal cases, but also in the logic of high-profile civil rights

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179. Telephone Interview with Jeff Robinson, Criminal Defense Attorney, Schroeter Goldmark & Bender (Jan. 18, 2013) [hereinafter Robinson Interview].

180. Telephone Interview with L. Song Richardson, Professor of Law, Univ. of Iowa Coll. of Law, Former State and Fed. Defender & Criminal Defense Attorney (Jan. 18, 2013).

litigation. Black professionals' achievement may also be used against pro-civil rights policies in debates over the continued propriety of and need for the preclearance provisions of the Voting Rights Act and affirmative action.<sup>181</sup>

## 2. *Representing the Race(s)*

We have argued that one new challenge for black civil rights lawyers is that their success can be used against their clients and against the validity of civil rights protections more generally, rather than understood as an embodiment of what might be possible for Blacks under conditions of true equality. But there is another dissimilarity between past and present black civil rights attorneys' symbolic social roles. Although both past and present black civil rights lawyers have had to worry about losing their ability to "represent the race" by being too convincing in their performances of "whiteness," for today's civil rights attorneys, performing whiteness too persuasively—or simply being their authentic selves in ways that are too disassociated with blackness and too much associated with whiteness—can carry heavier consequences. As Carbado and Gulati suggest in *Acting White?*, now more than ever, too much closeness with Whites can make a black attorney suspicious to the "race" that he or she is supposed to represent.

Jeff Robinson explains, for example, how he has struggled with these concerns as a black criminal defense attorney operating in a mostly white world with mostly black clients of a different socioeconomic status than him. Robinson explains his strategy for negotiating these boundaries:

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181. See *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), cert. granted, 133 S. Ct. 594 (2012); Greg Stohr, *Voting Rights Act Challenge Gets U.S. High Court Hearing*, BLOOMBERG (Nov. 9, 2012, 12:00 AM), <http://www.bloomberg.com/news/2012-11-09/voting-rights-act-challenge-gets-u-s-high-court-hearing.html> ("The U.S. Supreme Court will consider overturning a signal achievement of the civil rights movement, agreeing to hear a challenge to part of the 1965 Voting Rights Act in a case loaded with racial and political ramifications. Acting three days after minority voters propelled President Barack Obama to re-election, the court yesterday said it will review a provision that requires all or part of 16 mostly Southern states to get federal approval before changing their voting rules. Opponents say that 'preclearance' provision is no longer warranted."); see also *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012); Bill Mears, *Affirmative Action Under Pressure at Supreme Court*, CNN (Oct. 10, 2012, 8:44 PM), <http://www.cnn.com/2012/10/10/justice/court-affirmative-action/index.html> ("The race-conscious admissions policy at the University of Texas appeared to be in trouble on Wednesday after the conservative Supreme Court majority repeatedly questioned its continued application and effectiveness.").

One thing that all of my years of experience have taught me is about the overwhelming black migration from the South to the North and the West. It depends on whether I am speaking to someone closer to my age or someone who is a nineteen-year-old teenager. If my client is someone older, I share my personal history to connect. One thing that I have learned is that, for many black people, if you go back one or two generations, you find someone from the South. I tell them about growing up in Memphis in the 1960s, going to segregated schools, how my parents were involved in the civil rights movement. We just start talking and connecting. You go back far enough, and you often find that the two of you are just inches from each other. It's just that something deviated your path a little to the left and theirs a little to the right until you find yourselves far apart now.

If it is a nineteen-year-old kid, I spend time sharing my story with him, but I spend a significant amount of time asking him how he has grown up, in ways both related to and not related to the case. The fact is we share a race. We are both black, but there is a generation gap. I am still the old guy. I tell him, "My life may sound like a history to you but this is my life. I lived it." But, I also ask him to explain all the things in his life that I don't know about, but that can affect the case. That matters. You have to be willing to show, "I respect you as a human being and I recognize that you have things that you can teach me and that I can learn from you."<sup>182</sup>

Outside the area of criminal law, other black civil rights attorneys have experienced this need to carefully straddle the expectations of racial communities. For example, Connie Rice, a former NAACP Legal Defense Fund attorney, anti-gang advocate, and second cousin of former U.S. Secretary of State Condoleezza Rice, exposes how these issues of overcoming distrust that may stem from differences in the backgrounds of the privileged black attorney and her disadvantaged black client have been a lifetime struggle for her in her memoir, *Power Concedes Nothing*.<sup>183</sup> First, she speaks of being confronted with the question, "What is you?"<sup>184</sup> from a young black boy when she was a child in Arizona. Retrospectively addressing the question and the tension that it created, she states:

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<sup>182</sup>. Robinson Interview, *supra* note 179.

<sup>183</sup>. CONNIE RICE, *POWER CONCEDES NOTHING: ONE WOMAN'S QUEST FOR SOCIAL JUSTICE IN AMERICA, FROM THE COURTROOM TO THE KILL ZONES* (2012).

<sup>184</sup>. *Id.* at 7.

He was right. I was not black like him.

He was an undernourished, dark-skinned, ebonics-speaking son of migrant farm workers. I, a light-skinned Black American Princess, spoke the King's English to the Queen's taste and was the only daughter of a highly educated biology teacher and a decorated Air Force officer. I was the tolerated token. He was the discarded "other," consigned to the margins of society. I was the safer preference to him. His undiluted blackness rendered him invisible yet dangerous . . . .

His blood threatened white existence.

Mine did not.<sup>185</sup>

Rice acknowledges that until this encounter, she had confronted neither her relative race privilege nor the inequality affecting others;<sup>186</sup> however, having to come to grips with this intragroup inequality fueled her passion to become an advocate for justice.<sup>187</sup> On one level, the contemporary relevance of the "What is you?" question explains why a civil rights attorney working in an urban setting would potentially need to manage both white and black distrust. For example, in her extensive work on policing, Rice had to win over mostly white and male allies within the Los Angeles Police Department when she served as a consultant for the police union after first suing the department for civil rights violations.<sup>188</sup> Alternatively, she also had to perform her identity in a manner that gained her access to the Los Angeles urban gang communities that came to know her as a hard-nosed female attorney. Managing this type of divide is necessary for today's civil rights attorneys, for whom acceptance within certain majority communities, such as among police officers, may threaten the trust they need to establish with the mostly minority urban communities they represent.

To be sure, challenges to black civil rights attorneys' racial authenticity and trustworthiness, emerging from differences in socioeconomic and professional status between attorney and client, do not occur only within the black community, nor are they new. But the problem may be more acute today, when black civil rights attorneys are working to represent a race that does not necessarily see itself as a cohesive unit, or even necessarily as fighting against the same institutional adversaries.

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<sup>185</sup> *Id.* at 10.

<sup>186</sup> *Id.* at 16.

<sup>187</sup> *Id.* at 21.

<sup>188</sup> Carolyn Kellogg, *Book Review: 'Power Concedes Nothing' by Connie Rice*, L.A. TIMES, Jan. 8, 2012, <http://articles.latimes.com/2012/jan/08/entertainment/la-ca-connie-rice-20120108>.

In the post-civil rights era, black scholars such as Professor William Julius Wilson have highlighted class differences that they see as separating poorer Blacks from middle-class and upper-class Blacks in significant ways. As Wilson once asserted, "It is difficult to speak of a uniform black experience when the black population can be meaningfully stratified into groups whose members range from those who are affluent to those who are impoverished."<sup>189</sup> Additionally, the Pew Research Center recently released survey results that revealed a growing gap between the values of middle-class Blacks and poorer Blacks. Indeed, thirty-seven percent of all Blacks indicated that black people could no longer be thought of as a single race because of the diversity within the community.<sup>190</sup> Professor James Forman, Jr., contends similarly that "[c]lass differences have always existed within the black community—but never on anything approaching today's scale."<sup>191</sup> While noting that factors such as unemployment are extremely high for young black men and that "[i]n some respects, blacks are no better off than they were in the 1960s" but instead "are much worse off," Forman highlights the fact that the black middle class has

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189. WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS*, at x (2d ed. 1980); see also *id.* at 152 ("The recent mobility patterns of blacks lend strong support to the view that economic class is clearly more important than race in predetermining job placement and occupational mobility."); cf. Carla D. Pratt, *Way To Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 *FORDHAM L. REV.* 1409, 1411 & n.11 (2009) (defining the black community "as a multilevel sociopolitical group comprised of individuals with a shared racial identity and a shared racial history, with institutions aimed at preserving black culture and promoting black interests" and arguing that (1) black lawyers serve "a representative function in our democracy by serving as ambassadors to democratic institutions such as our courts, legislatures, and executive agencies . . . [a]nd a legitimizing function through descriptive representation because their mere physical presence in government tends to promote public confidence . . . in our democratic institutions"; (2) "black lawyers serve an interpretive function by speaking the language of democracy and being able to translate that language into language that is meaningful and helpful to the black community"; and (3) "black lawyers serve a connective function by acting as a conduit that affords both black and nonblack citizens of lesser economic means access to the democratic institutions we call courts").

190. *Optimism About Black Progress Declines: Blacks See Growing Values Gap Between Poor and Middle Class*, PEW RES. CENTER (2007), <http://pewsocialtrends.org/files/2010/10/Race-2007.pdf>. The report also indicated that

blacks with lower incomes and less education . . . are most inclined to see few shared values between middle class and poor blacks—suggesting that the perception of differences over values and identity within the African American community is felt most strongly by those blacks at the lower end of the socio-economic spectrum.

*Id.* at 3.

191. Forman, *supra* note 161, at 55.

grown significantly: black families who have an income of \$100,000 a year or more increased from two percent of black households in 1967 to ten percent in 2011.<sup>192</sup>

Such increasing divisions within the black population arguably have significant implications for black civil rights attorneys' decisions and litigation strategies and for the degree to which they are perceived as representing the entire race. Scholars such as Forman have asked whether black elites, especially black practicing attorneys and law professors, have set an agenda to address racial discrimination in the criminal justice system that comports more with their own experiences—for example, by focusing on racial profiling, which “[a]ll blacks confront . . . regardless of age, dress, occupation or social station,” rather than on the concerns of a larger and more vulnerable portion of the black population, such as the mass incarceration of poor, uneducated Blacks.<sup>193</sup> Forman argues that the civil rights community's focus on more “universal” problems for Blacks, such as racial profiling or the societal racism and discrimination that warrant affirmative action policies, works to the disadvantage of those in the black community whose class status makes them vulnerable to mistreatment. Forman further inquires, “If prison is reserved for less-privileged blacks, what implications does this have for the idea that blacks share a linked fate that binds them across socioeconomic classes?”<sup>194</sup> Similarly, Professor Michelle Alexander has criticized the emphasis on legal work that tends to address the interests of relatively more privileged Blacks, such as affirmative action, instead of legally challenging the structures and policies that have resulted in the mass incarceration of black men.<sup>195</sup>

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192. *Id.*; see also Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1076 (2010) (arguing that the criminal justice system today inflicts harms on racial minorities similar to those of the Jim Crow era); McFarlane, *supra* note 158, at 191 (“The oppression of slavery and Jim Crow is not gone; instead, it has been disaggregated and reassembled into more efficient components of oppression.”).

193. Forman, *supra* note 161, at 56–57. Charles Ogletree addressed similar questions in a 2010 book examining “the race and class dimensions of the [Henry Louis] Gates arrest by looking at how other successful, prosperous, and noteworthy African American men . . . have grappled with a wide range of encounters not only with police but with countless everyday citizens and found themselves being judged by the color of their skin rather than ‘the content of their character.’” OGLETREE, *supra* note 139, at 13.

194. James Forman, Jr., *The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791, 795 (2011).

195. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 157 (2010).



In all, what has become undeniable is that, unlike previous generations of civil rights lawyers, this current and the next generation of civil rights lawyers are not working within a context in which there is a completely totalizing structure of domination against Blacks. As Carbado and Gulati tell us, in today's world, some Blacks, even if only a limited number, will certainly be included within circles of power and opportunity.<sup>196</sup>

#### IV. STRATEGIES FOR THE NEXT GENERATION OF CIVIL RIGHTS LAWYERS

In this Part, we consider how learning from the civil rights efforts surveyed in *Representing the Race* and *Acting White?* may help to rechannel the current study and practice of civil rights law in more experimental, activist directions. The two books investigate the changing meaning of color and race in the evolution of the civil rights movement from the Jim Crow era through the election of President Obama.

Mack, Carbado, and Gulati demonstrate that new directions in civil rights advocacy and research may stem from the adoption of a flexible, race- and identity-conscious vision of community-based empowerment that looks to ally with grassroots organizations and reach multicultural populations. Alliances among diverse constituencies require a vision sufficiently flexible to encompass the contingencies of race, ethnicity, immigrant and citizenship status, disability, language, gender, sexuality, and other categories of group difference-based identity, as well as the stratifications of class and socioeconomic status. *Representing the Race* and *Acting White?* challenge civil rights academics and advocates to transform their understanding of representation through a fuller appreciation of color, race, and community in history and practice. Together, they aspire to teach a new generation of civil rights lawyers and scholars about the breadth of identity and the cultural power of racial community in contemporary American law and society.

We build on the pathbreaking historical and cultural studies of Mack, Carbado, and Gulati to offer an alternative practice of color, race, and

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196. Accord Forman, *supra* note 161, at 58 ("In Mississippi, in 1950, the totalizing nature of Jim Crow ensured that to be black meant to be second class; there were no blacks free of its strictures. But mass incarceration [for example] is much less totalizing. In 2011, no institution can define what it 'means to be black' in a way that Jim Crow or slavery once did.").

community in legal education<sup>197</sup> and advocacy.<sup>198</sup> We do so in two ways. First, we discuss new strategies that can help the civil rights community begin to get the public in the United States to understand the centrality of race and racism (and other forms of prejudice) to our history as well as the continuing prominence and operation of race in our everyday experience. Second, we explore new teachings, methods, and tactics that can inspire the future generation of civil rights lawyers of all races (1) to identify for themselves and become comfortable with their individual roles in working toward true equality in racial and other civil rights-based movements; (2) to devise tactics for how to object, both explicitly and subtly, to inappropriate uses of race in the justice system, and specifically in the courtroom; (3) to avoid their own inappropriate uses of race in their representations that may be more harmful to the interests of their clients and their communities in the long run; and (4) to reintegrate narratives and understandings of race that not only enable success in the courtroom, but also keep alive the perspectives that too often get marginalized or go unnoticed in the law. These strategies, we contend, can help to train the next generation of civil rights lawyers.

#### *A. Lawyer and Politician: The New Civil Rights Lawyer*

First and foremost, preparing the next generation of civil rights lawyers—of all races—requires that we teach such aspiring lawyers how to win the battle of rhetoric and politics as much as we teach them how to read, analyze, and apply the law; draft supporting documents; and make arguments to judges and juries. They must be as immersed in the language of public policy and political advocacy as they are in understanding and applying the law. In other words, they must learn not only to win their campaigns within the courtroom, but also their campaigns before the general public.

Indeed, Critical Race Theorists have long argued that legal arguments must be framed for and told to wider audiences. Scholars such as Professor Richard Delgado have highlighted the need to use tools such as narrative and storytelling to make the law more accessible.<sup>199</sup> Similarly, feminist legal

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197. See Mario L. Barnes, *Racial Paradox in a Law and Society Odyssey*, 44 LAW & SOC'Y REV. 469 (2010).

198. See Barnes et al., *supra* note 153; Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647 (2005).

199. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440-41 (1989) ("Stories humanize us. They emphasize our differences in ways

theorists such as Professor Kathy Abrams and gay rights scholars such as Professor William Eskridge also have pointed to narratives as a tool for speaking to a broader range of people and for inciting change.<sup>200</sup> Finally, law and literature scholars such as Professor Peter Brooks have emphasized the importance of studying “perspectives of telling,” noting that “[n]arratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results.”<sup>201</sup>

The retrenchment of civil rights policies since the early 1980s has made clear to those in civil rights communities that the effective telling and retelling of stories and arguments are essential for the Left to win what Professors Michael Omi and Howard Winant have called “racial projects.” “Racial projects,” Omi and Winant write, “do the ideological ‘work’ of making” links “between structure and representation.”<sup>202</sup> One successful racial project, for

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that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else’s spectacles. They challenge us to wipe off our own lenses and ask, ‘Could I have been overlooking something all along?’ . . . Traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. In part, this is so because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions. The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry. Legal storytelling is an engine built to hurl rocks . . . .”); see also Charles Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 46 LAW & SOC’Y REV. 247, 251 (2012) (“Stories express depth and complexity, and allow for ambiguity and multiple interpretations. They inspire feelings of commonality, connectedness, and empathy among tellers, listeners, and the subjects of our stories.”).

200. Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 972 (1991) (“They may be a bridge to those who share a similar vision, or a means of inciting change among those who do not.”); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 607-08 (1994) (“Traditional scholarship tells stories about the parties to a lawsuit and their experiences in appellate court. . . . The stories told in traditional scholarship focus on issues important to legal elites and are told from their point of view, which is often presented as the consensus or neutral perspective. Since these elites have been overwhelmingly white, male, affluent, and ostensibly heterosexual, one might wonder whether their stories really reflect social consensus or neutral values . . . . Like traditional scholars, outsiders rely on a narrative methodology to express their ideas. But, unlike those of traditional scholars, outsider narratives are stories ‘from the bottom,’ retellings of law from the point of view of women, people of color, lesbians, gay men, bisexuals, and other suppressed groups. These stories often reflect the writers’ personal experiences; telling these stories supplements the other consciousness-raising methodologies employed by outsider communities.”).

201. Peter Brooks, *Narrative Transactions—Does Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 2, 13 (2006).

202. OMI & WINANT, *supra* note 156, at 56 (emphasis omitted).

example, has been the conservative effort to establish colorblindness—the notion that race “can play no part in government action” and that “[n]o state policy can legitimately require, recommend, or award different status according to race”—as the ideal.<sup>203</sup> As Omi and Winant explain:

A racial project is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines. Racial projects connect what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized, based upon that meaning.<sup>204</sup>

In the war of racial (and other identity-based) projects in society, the progressive, civil rights-oriented racial project has sustained serious losses, and the ability of conservatives to both frame and control the language and arguments in these debates has played a critical role in such losses. Professor William Julius Wilson argues, for example, that part of the Left’s strategic downfall in the battle over affirmative action policies has been its failure to frame affirmative action as an “opportunity-enhancing” policy, of which polls show a majority of Whites approve, instead of as a “racial preference” program, which the majority of Whites tend to reject.<sup>205</sup>

To become more successful in the war of redistributive projects, the next generation of civil rights lawyers must become just as savvy as their opposition at creating, developing, and ultimately winning its racial or other necessary projects. In developing this rhetoric, moreover, the civil rights lawyers of this generation and the future must make sure that they are not pushing forward with their projects in ways that run contrary to their goal. For instance, they should avoid campaigns, like the ACLU’s racial profiling campaign,<sup>206</sup> that make troubling distinctions between good Blacks and bad Blacks. As Carbado and Gulati argue, the focus on the wrongs of racial profiling for respectable or “good” Blacks and Latinos reinforces the distinctions between good Blacks and Latinos and bad Blacks and Latinos. It perpetuates the stereotypes of black and brown criminality and does little to help those who are viewed as bad Blacks or

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203. *Id.* at 57.

204. *Id.* at 56.

205. William Julius Wilson, *Race and Affirming Opportunity in the Barack Obama Era*, 9 DU BOIS REV. 5 (2012).

206. See *supra* note 137 and accompanying text.

Latinos—those most vulnerable to the severe consequences of racial profiling like incarceration, those “about which the public must come to care.”<sup>207</sup>

Rather than featuring black and brown professional men as the innocent victims of racial profiling, the next generation of civil rights lawyers should more directly engage racial profiling as a moral and discriminatory wrong that weakens our justice system. For example, a new racial profiling campaign could feature advertisements that cut to the core issues: unconscious racial bias and stereotyping. In lieu of the ACLU’s images of successful, “good” black and brown professionals victimized by profiling, imagine the following scene:

On one-half of one page of a two-page foldout, there is a picture from the neck down of a twenty-something-year-old man dressed in stereotypical hip-hop clothing (sagging jeans, gold chains, and so on) and with gloves on. No one can see the color of his hands.

On the other half of that same page, there is a picture from the neck down of a thirty- to forty-year-old man in a suit. He, too, wears gloves so no one can see the color of his hands.

Underneath these two men’s images are the words: “One of these men is 1.5 times more likely to be stopped by the police and four times more likely to be searched than the other.”<sup>208</sup>

Flip the page, and one sees that the man in the suit is black or brown, and the man in the stereotypical hip-hop clothing is white. More importantly, one sees that the black or the brown man in the suit is significantly more likely to be racially profiled. On the bottom of that

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207. CARBADO & GULATI, *supra* note 2, at 112; see *id.* at 107-14.

208. See Chet KW Pager, *Lies, Damned Lies, Statistics and Racial Profiling*, 13 KAN. J.L. & PUB. POL’Y 515, 522 (2004) (reporting evidence that blacks were four times more likely to be searched by police on I-95); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2038 n.16 (2011) (noting that African Americans and Latinos in Rhode Island were “much more likely to be stopped by police and much more likely to be searched once stopped, even though Whites were more likely to be found with contraband” (quoting ACLU & Rights Working Grp., *The Persistence of Racial and Ethnic Profiling in the United States: A Report to the U.N. Committee on the Elimination of Racial Discrimination*, ACLU 62 (June 30, 2009), [http://www.aclu.org/pdfs/humanrights/cerd\\_finalreport.pdf](http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf))); Richardson, *supra*, at 2038 nn.17-19 (gathering evidence that, in Missouri, “blacks were sixty-six percent more likely than whites to be stopped, and 1.79 times more likely to be searched than whites”; in West Virginia, that “Blacks and Latinos are 1.5 times more likely to be stopped than whites, and 2.5 times more likely to have their vehicles searched despite the fact that minority drivers are less likely to have contraband”; in New York, that “blacks were stopped twenty-three percent more often than whites and this proportion of stops was not explained by previous arrest rates”; and, in Los Angeles, that “blacks were more than twice as likely as whites to be stopped”).

page, these words appear: "Surprised by the result? Urge police to stop racial profiling. If you imagined these two men's races differently, ask yourself why. End racial stereotyping, and stop racial profiling. Fair treatment should not turn on race."

Or one could slightly alter the scene above to directly touch upon people's sense of fairness in treating likes alike, placing two images of young men in stereotypical hip-hop clothing side-by-side, only to reveal that one is more likely to be stopped and searched because he is black while the other is white.

Indeed, even if civil rights lawyers want to focus on the profiling of innocent, law-abiding, and prominent black or brown male citizens, they could simply do so in a way that poses a different question and that challenges the framing of some Blacks as good and deserving and other Blacks as bad and unworthy (much as the welfare debate has done for women of color). For example, imagine this material:

On one half of the top two-thirds of the page, there is a picture of a thirty- to forty-year-old black or brown man in a suit named "Bob," with the following words underneath his image: "If it upsets you to learn that this man was racially profiled . . ."

On the other half of the top two-thirds of the page, there is a picture of a twenty-something black or brown man dressed in stereotypical hip-hop clothing named "Tyrone," with the following words underneath his image: "then it should also upset you to learn that this man was racially profiled."

On the bottom third of the page, the following words appear: "Tyrone is a straight-A student at UCLA. If you are only upset about his being racially profiled only after learning this fact, ask yourself why. Fair treatment should not turn on race, one's degree, or one's pedigree."

Additionally, in framing their racial (or other) projects, the next generation of civil rights lawyers must heed the call of scholars like Forman, who have highlighted the dangers in telling stories that speak to only one group. Pointing to Professor Michelle Alexander's poetic and compelling claims in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,<sup>209</sup> Forman contends that those who are working to advance black civil rights must make sure that the message of their legal and social movement is "multiracial," in that it recognizes how the interests of Blacks coincide with the interests of

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209. ALEXANDER, *supra* note 195.

other subordinated groups.<sup>210</sup> While acknowledging the rhetorical force and power behind defining the racism and discrimination that drives mass incarceration and other inequities for Blacks as the new Jim Crow, Forman argues for a more multiracial, or multidimensional,<sup>211</sup> framing of these issues on the ground that “framing issues in terms of black and white discourages other racial minorities from engaging in coalition politics.”<sup>212</sup> The current and the next generation of civil rights lawyers should work to embrace and connect the racial profiling of black and brown men in their cars, in schools, on the streets, and even in their homes;<sup>213</sup> with the type of racial profiling against Latinos that Senate Bill 1070 endorses in Arizona;<sup>214</sup> with the kind of racial profiling that has increased and gained support against those who are perceived to look Muslim in airports and at borders;<sup>215</sup> with the kind of

210. Forman, *supra* note 161, at 64.

211. This term is borrowed from Hutchinson, *supra* note 170, at 309.

212. Forman, *supra* note 161, at 64 (paraphrasing Hutchinson, *supra* note 170).

213. The Henry Louis Gates arrest illuminated this kind of profiling. See OGLETREE, *supra* note 139, at 53-55 (analyzing the Gates arrest and the various responses thereafter); Cooper, *supra* note 153 (same). On racial profiling more generally, see Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 974 (2002), which explains that the failure to condemn racial profiling as “per se problematic” “entrenches our racial suspicions about crime and criminality”; Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 869-76 (2002), which discredits justifications for racial profiling; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997), which offers empirical evidence about the connection between racial bias and pretextual traffic stops; David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 267 (1999), which notes that data support the belief that Blacks are “stopped and ticketed more often than whites”; and Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 346-47 (2003), which argues that “[b]oth groups [African Americans and Latinos] are demonized as criminals, drug dealers, and gang members, are the most likely victims of police brutality, and are disproportionately represented in the prison population” (footnotes omitted).

214. See George A. Martinez, *Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L.J. 175, 186 (2012) (“S.B. 1070 operates to create distance between the Anglo majority and Latinos as it authorizes the racial profiling of Latinos and those suspected of being undocumented.”); see also Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts To Regulate Immigration*, 46 GA. L. REV. 609, 629-32 (2012) (discussing the implications of laws like S.B. 1070 on communities of color).

215. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1267-82 (2004) (critiquing laws and policies that essentially permit Arabs, Muslims, and South Asians to be targeted by racial profiling in the name of national security); see also Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 40 (2009) (“Concurrently,

profiling that is motivated by stereotypes about Vietnamese gangs;<sup>216</sup> and with the type of racial profiling that occurs against black and Latina women who are presumed to be drug mules in airports.<sup>217</sup> Adding such content would make racial profiling campaigns, such as those of the ACLU and those that we proposed above in this Book Review, even stronger. Imagine this particular advertisement, inspired by Pastor Martin Niemöller's famous words<sup>218</sup>:

On the top fifth of a page is an image of young black teenage male being stopped and frisked by two police officers while on foot in a neighborhood with big houses. Text next to this image reads: "First they profiled Blacks and I did not speak out because I was not black."

On the second fifth of a page is an image of a pregnant Latina in an airport being stopped and frisked by two police officers near an airport security line. Text next to this image reads: "Then they profiled Latinas/os and I did not speak out because I was not Latina/o."

On the third fifth of a page is an image of a Vietnamese twenty-something-year-old man being stopped and frisked by two police officers near his car. Text next to this image reads: "Then they profiled Vietnamese individuals and I did not speak out because I was not Vietnamese."

On the fourth fifth of a page is an image of a Muslim woman in an abaya (dress) and with a hijab around her hair, neck, and chest being stopped and frisked by two police officers after going through a airport security line. Text next to the image reads: "Then they profiled Muslims and I did not speak out because I was not Muslim."

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governmental racial profiling and preventative law enforcement practices carried out in the form of airport profiling, secret arrests, race-based immigration policies, and selective enforcement of immigration laws of general applicability legitimize private biases against Muslims, Arabs, and South Asians.").

216. Jin S. Choi & Ernest Kim, Comment, *The Constitutional Status of Photo Stops: The Implications of Terry and Its Progeny*, 2 ASIAN PAC. AM. L.J. 60, 60-62 (1994) (discussing a case that the ACLU filed after "police departments in Orange County, California . . . adopted the practice of photographing Asian Americans suspected of being gang members").

217. See, e.g., Michelle Rocío Nasser, Consuming Colombia: Patricia Engel's *Vida* and the Tensions of (U.S.) *Colombianidad* (2012) (unpublished manuscript) (on file with authors) (analyzing stereotypes of Colombian women as drug mules).

218. In the postwar era, Niemöller's poem has received wide application in Europe, the United States, and elsewhere, including cross-racial usage. See, e.g., Charles Mingus, *Don't Let It Happen Here* (Charles Mingus Quintet at Birdland 1962). Our adaptation of the poem here is in no way intended to analogize or compare racial profiling to state-sponsored violence.



The bottom fifth of the page contains the following words: "Don't wait until there is no one left to speak for you. Together, we can end racial stereotyping and stop racial profiling."

The task of organizing and overseeing a multiracial or multidimensional civil rights movement or campaign is not easy, but it certainly is necessary. The current and the next generation of civil rights lawyers must not only be willing, but also ready and equipped to do so.

*B. Civil Rights Lawyers in Black and White: Next-Generation Majority and Minority Representation in the Courtroom and Beyond*

In addition to considering how the next generation of civil rights lawyers can make meaningful contact with the general public and convince the public to adopt their frame for examining civil rights issues, they must also think carefully about how they define their own roles and language in the courtroom, both individually and as a group. In this Section, we focus on four specific items that this group of attorneys must address: (1) the question of whether nonblack lawyers can represent the race; (2) the ways in which future civil rights lawyers may object to improper applications and abuses of race and racial stereotyping in the courtroom; (3) the means that such lawyers may use to give voice to the persons and communities they represent, without relying on stereotypes that entrench inequalities; and (4) the naming and claiming of a space for the honest examination of race and racism inside and outside the courtroom.

*1. Representing the Race When One Is Not of the Race*

The next generation of civil rights lawyers must consider the responsibilities of lawyers who do not share the same race (or other identity status) as the individuals and communities whom they represent. In so doing, the next generation of civil rights lawyers must confront a question that Mack does not address in *Representing the Race*: What does it mean for white lawyers to represent a race? Mack acknowledges that his work "is not intended to slight the accomplishments of white lawyers who did civil rights work."<sup>219</sup> Nonetheless, he points out that John Mercer Langston, in the late 1850s, rejected the idea that representative *white* men should speak for black

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<sup>219</sup> MACK, *supra* note 1, at 9.

Americans.<sup>220</sup> Moreover, Mack notes that black lawyers during the early decades of the twentieth century chafed under the NAACP's "preferred" policy of retaining white lawyers for its "most important" high-profile cases.<sup>221</sup> Yet, as Mack mentions, at the National Bar Association's (NBA) 1931 convention, Joseph Brodsky, a white lawyer and the chief attorney for the radical, Communist-affiliated International Labor Defense organization, thrust black lawyers "on the defensive" by "claiming that he was the representative of poor African Americans."<sup>222</sup> In the courtroom, Mack explains, "Brodsky saw himself as a representative of the masses of poor southern blacks (and whites)—not because he resembled those masses, but because he stood at the vanguard of an inchoate movement of workers and farmers."<sup>223</sup>

Unlike Brodsky, several decades later, some nonblack civil rights lawyers have struggled with the idea of claiming and naming their space and role as a representative for Blacks and other communities of color. For instance, reflecting upon her experience as a public defender in Washington, D.C., and Miami, Professor Aya Gruber describes her initial discomfort as a biracial (Asian and white) woman of color who represented primarily black and Latino defendants:

As a public defender in Washington, D.C., I represented an indigent clientele, the vast majority of whom were African American men. . . . I can honestly say, however, that at times I felt a bit conflicted about my work with indigent defendants. In many aspects, they were wholly unlike me: indigent, African American, and male. Many of my clients in Miami were Latino, arguably an ethnicity with which I could possibly identify, as my outward appearance is most often taken for Latina. These clients, however, were nearly all Spanish-speaking and immigrant, two characteristics I do not possess. . . .

My sense of unsettledness came from my inability to engage in identity politics regarding my clients. Put another way, I could neither figure out nor explain why I had the right to represent my clients, as individuals or as a group. What privilege to advance their cause could I

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220. *Id.* at 21.

221. *Id.* at 68.

222. *Id.* at 156.

223. *Id.* at 157-58; see also RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); Risa Lauren Goluboff, "Let Economic Equality Take Care of Itself": *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 *UCLA L. REV.* 1393 (2005).

claim? What gave me the right to maintain the issue of their subordination as my own and fight against it?<sup>224</sup>

The kinds of questions that Gruber had about her role on the civil rights side of the criminal justice system are not uncommon for lawyers who do not share the same race as their criminal defendant clients. And, of course, there is no easy answer to these internal struggles; each attorney's answer must personally come from her or him. One way in which lawyers who do not share the same identity group as their clients may come to claim and name their space in the movement is by identifying their own shared goals as a member of *another* subordinated group. The experience of Pauli Murray, recounted by Mack; the problems faced by the hypothetical employee Tyisha, explained by Carbado and Gulati; and the scholarship of those who urge coalitions of differing identity groups to address civil rights issues may offer some guidance on how each individual lawyer may approach these questions about who can represent the race. As the work of Mack, Carbado, and Gulati highlights, individuals' existence at the intersection of various identity categories—for instance, Murray's race, gender, and sexuality—shapes each person's life experiences and influences the extent to which each person may be privileged or disadvantaged in different contexts. Drawing on Professor Derrick Bell's theory of interest convergence, for example, Professor Catherine Smith identifies "'outsider' interest convergence" as a means by which marginalized groups of one form or another may use their overlapping interests to better understand each other's subordination and challenge and change the status quo.<sup>225</sup>

Ultimately, however, the only question that each individual lawyer in the next generation of the civil rights movement must ask and answer in claiming her space and role as a "representative" of the struggle is: Am I advancing the fight? Am I pushing the movement forward and closer to its goals? Jeff Robinson reflects that each attorney's self-identified role, change, or action may be large or small, depending upon his vision. Robinson explains that he attempts to advance broader goals in smaller ways:

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224. Aya Gruber, *Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital—An Exercise in Praxis*, 35 SETON HALL L. REV. 1201, 1232-33 (2005).

225. Catherine Smith, *Unconscious Bias and "Outsider" Interest Convergence*, 40 CONN. L. REV. 1077, 1087-93 (2008). Smith contends: "Outsider interest convergence requires those committed to a larger anti-subordination framework to chart how racism, homophobia, classism, ableism and sexism come together to marginalize many subordinated groups in order to preference some." *Id.* at 1090.

I try to focus not on achieving racial justice in the entire world forever, but instead I ask, “How can I get racial justice for the duration of the trial in this courtroom?” And if the client is acquitted, I believe that you as the lawyer have been an agent for significant change—not in the world but in the life of the client. You have helped give him an incredible gift—another chance in the world.<sup>226</sup>

In fact, answering the question about advancement, whether large or miniscule, was exactly how Gruber ultimately came to terms with her role as an Asian-American female defender who primarily represented black and Latino male criminal defendants. She explained:

Eventually . . . [my] feelings of illegitimacy subsided as the struggle [against an unjust and racially hostile legal system] manifested itself as far more important than my place in the struggle. What turned out to matter in the end was not whether I was the right person to be a public defender, but whether I was a good defender—whether I produced change.<sup>227</sup>

At the end of the day, we acknowledge that identifying one’s own position in any movement is difficult, particularly when the lawyer does not “belong” to the outsider group that he or she is representing. Certainly, one must always be conscious of the various differences within any collaborative group of civil rights lawyers and must be careful to listen to all perspectives within that group. So long as an attorney’s work pushes the goal of achieving basic civil rights forward, however, the next generation of civil rights lawyers should recognize that any person, regardless of how they racially identify, can represent the race. The related lesson, then, is that there is more than one way of actually “representing” the race.

## 2. *Objecting to the Exploitation of Race and Exploiting Race*

In light of the more subtle ways that racism is practiced in today’s society and lawyers’ increased awareness of the implicit biases often operating against black and brown litigants, particularly criminal defendants,<sup>228</sup> the next

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226. Robinson Interview, *supra* note 179.

227. Gruber, *supra* note 224, at 1233.

228. L. Song Richardson & Philip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 302–14 (2012); see also Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision To Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1015–22

generation of civil rights lawyers must think more carefully about how to expose and counter the racialized communications that occur, both explicitly and implicitly, within the courtroom. For Mack, the 1931 NBA convention raised two questions that were central to the evolving professional identity of black civil rights lawyers and the black bar as a whole. The first question—“Exactly what was the relationship between courtroom space and race?”<sup>229</sup>—reverberates in the daily work of civil rights advocates,<sup>230</sup> in the ongoing research of post-civil rights movement scholars,<sup>231</sup> and in the classroom and courthouse pedagogy of clinical law teachers.<sup>232</sup> The second question—“Did black lawyers really stand in for the rest of the race when they made common cause with their white counterparts?”<sup>233</sup>—resonates in the doubts often expressed by black clients and communities regarding the fairness of civil rights trials and the loyalty of their legal representatives, especially at sentencing. Both questions—racial space and racial representation—invite an analysis of lawyer discretion in objecting to and exploiting race inside the courtroom and in facilitating client and community legal-political decisionmaking outside the courtroom. We turn first to the way that the next generation of civil rights attorneys should lodge objections to race.

#### *a. Objecting to Race*

Because the use and the misuse of race has become more subtle within the modern courtroom, the next generation of civil rights attorneys must cautiously consider how it can develop a toolkit to most effectively challenge explicit and implicit racism within the courtroom without also sacrificing the interests of their clients. Mack offers a useful historical context in which to begin to think about such a toolkit. Specifically, through his account of Angelo Herndon’s case and the civil rights work of Ben Davis in 1933, Mack provides a starting point for an analysis of courtroom objections to race and the development of a formal law school pedagogy of race-based objections. Mack

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(2007); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 877, 889-91 (2004).

229. MACK, *supra* note 1, at 161.

230. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

231. See Ariela J. Gross, *From the Streets to the Courts: Doing Grassroots Legal History of the Civil Rights Era*, 90 TEX. L. REV. 1233, 1239-49 (2012) (reviewing BROWN-NAGIN, *supra* note 163).

232. See Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a “Post-Racial” Society* 13-20 (Nov. 2012) (unpublished manuscript) (on file with authors).

233. MACK, *supra* note 1, at 161.

recounts that Davis entered the Depression-era courtroom in Atlanta, Georgia “expecting to make headway against the customs of courtroom space that marked black people as inferior,” only to “hear racial epithets voiced in open court by his fellow lawyers and judges.”<sup>234</sup> Rather than carve out and enlarge space for racial equality within the fraternity of the Southern bar and bench, Mack comments, the trial degenerated into “heated” and “angry exchanges” between Davis and Judge Lee Wyatt as well as lead prosecutor John Hudson over “the proper racial etiquette to be used inside the courtroom.”<sup>235</sup> Mack observes that Judge Wyatt “quickly marked Davis as a racial inferior,” denying his jury challenges protesting the exclusion of Blacks without a hearing and even turning his back when Davis proffered argument.<sup>236</sup> Hudson similarly treated Davis “as a social inferior,” Mack reports, “referring to him as ‘Young Ben’ inside the courtroom.”<sup>237</sup>

Mack highlights the “intense struggle over racial language” in the routine colloquies of the Southern courtroom at the *Herndon* trial.<sup>238</sup> These colloquies recur today in contemporary federal and state court settings, albeit typically in a more oblique, nuanced fashion. In fact, Mack’s stark depiction of Davis’s professional struggle in the bitterly fought *Herndon* trial reopens a vital yet often overlooked inquiry into the current form and substance of courtroom objections to race by white and black civil rights lawyers. For both groups of lawyers, the opportunity to lodge race objections arises regularly in civil and criminal courtrooms—for example, in challenges to arrest,<sup>239</sup> search and

<sup>234</sup>. *Id.* at 168.

<sup>235</sup>. *Id.* at 169.

<sup>236</sup>. *Id.*

<sup>237</sup>. *Id.*

<sup>238</sup>. *Id.* at 170. Consider in this retrospective light the blunt, racialized courtroom exchange between Davis and E.A. Stephens, a Georgia assistant solicitor, which Mack gleaned from the *Herndon* trial record:

E. A. Stephens [assistant solicitor]: Officer Watson, or Mr. W. B. Martin, I don’t recollect which, brought this nigger, Angelo Herndon, to the solicitor’s office.

Attorney Davis: Mr. Stephens refers to the defendant as “nigger.” Your Honor . . . it is prejudicial to our case.

The Court [Wyatt]: I don’t know whether it is or not; but suppose you refer to him as the defendant. . . .

Stephens: I will refer to him as “negro” which is better; he gave the name of Alonzo Herndon—Angelo Herndon; he is the darkey with the glasses on.

*Id.*

<sup>239</sup>. See R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1077 n.3, 1078–79 n.8 (2001).

seizure,<sup>240</sup> prosecutorial charging,<sup>241</sup> jury selection<sup>242</sup> and nullification,<sup>243</sup> discovery<sup>244</sup> and witness examination,<sup>245</sup> and oral argument.<sup>246</sup> Such objections implicate legal doctrine, procedural and evidentiary rules, trial strategy, and professional responsibility considerations.<sup>247</sup>

For instance, since the 1986 decision of *Batson v. Kentucky*, in which the U.S. Supreme Court held that jury pool members cannot be excluded because of their race and that such members would be placed on the jury on the ground of racial discrimination if the prosecutors who used a peremptory strike on them failed to provide a legitimate, nonracial reason for excluding them from the jury,<sup>248</sup> civil rights lawyers have lodged countless objections against opposing attorneys' improper uses of race to exclude black people from jury panels, but to no avail. Courts have so broadly applied the term "race-neutral" to lawyers' asserted reasons for peremptory strikes that *Batson* has, to some extent, lost all meaning. As Bryan Stevenson, a black man and one of the premier capital defense attorneys in the country, has explained, courts have accepted as "race-neutral" and nonpretextual reasons for exclusion that include claims that a black juror "appeared to have 'low intelligence,'" "wore eyeglasses," was "too old for jury service at age forty-three or too young at twenty-eight," had "relatives who attended historically black colleges," chewed gum, lived in predominantly black neighborhoods, and in one instance, "'shucked and jived' as he walked."<sup>249</sup>

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240. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

241. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

242. See Audrey M. Fried, *Fulfilling the Promise of Batson: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311 (1997); Sheri Lynn Johnson, *The Language and Culture (Not To Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993).

243. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

244. See, e.g., Anthony V. Alfieri, *Discovering Identity in Civil Procedure*, 83 S. CAL. L. REV. 453, 462-67 (2010).

245. See GROSS, *supra* note 154; Gross, *supra* note 154.

246. See, e.g., Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997).

247. See Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997).

248. 476 U.S. 79, 100 (1986).

249. Bryan Stevenson, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, 37 HUM. RTS. 5, 5 (2010).

Linked to identity status, Carbado and Gulati importantly explain, race-based objections also “create discomfort.”<sup>250</sup> For civil rights lawyers informed by this analysis, objections that “consistently point out instances of unfairness against outsiders” will make insiders—lawyers and judges and even jurors—“uncomfortable.”<sup>251</sup> Nevertheless, objections rooted in a strategy of discomfort, however disconcerting, may effectively establish the “groundwork for a discrimination claim by identifying and calling attention to examples of discrimination” both inside and outside institutional settings.<sup>252</sup>

Yet, for majority and minority civil rights lawyers alike, meaningful discussion of the ethics and strategy of race-based objections is largely absent from the literature of clinical education, trial advocacy, civil rights litigation, and equally noteworthy, from the work of Critical Race Theory and Latino/a Critical Theory. A similar absence afflicts scholarly discussion of the costs, burdens, and risks of racialized identity performances delineated by Carbado and Gulati.<sup>253</sup> This absence may be attributed in part to the narrow account of *client and community identity*—race, gender, class, and sexuality—in the “practice” literature of legal education and lawyer skills training. This particular account of client and community identity tends to view the identity factors for individuals, such as race, as defined solely by physical factors like skin color or eye shape, rather than also by performance and community, and it tends to view the concept of client as only encompassing the litigant in that one case (though understandably so) as opposed to all of the persons and future litigants who may be affected by any race-based objections that are lodged at that moment. Also, the absence of the ethics and strategy of race-based objections may be attributed in part to the limited amount of “theory” literature in progressive legal scholarship and interdisciplinary study on *client and community practice*—individual counseling, group collaboration, rights education, and neighborhood mobilization.

To remedy this dual absence, the future generation of civil rights attorneys must formulate a basic toolkit or primer of sorts on the ethics and strategy of race-based objections that differentiates colorblind or race-neutral objections and color- or race-coded objections from more affirmative, race-conscious objections. By definition, colorblind or race-neutral objections deny the legitimacy and utility of racial categories for the purposes of sorting legal rights and duties. Color- or race-coded objections, by comparison, covertly and

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250. CARBADO & GULATI, *supra* note 2, at 33.

251. *Id.*

252. *Id.* at 34.

253. *See id.* at 21–45.



sometimes overtly invoke racial categories or tropes as a means of assigning rights and duties and ascertaining culpability and truth. This is particularly the case when determining the guilt or innocence of the accused in criminal justice proceedings. Race-conscious objections, by contrast, expressly presume the coherence, durability, and pervasiveness of racial categories in law, culture, and society, and openly seek to affirm their cognitive and interpretive relevance to the adjudication of legal rights and duties.

In addition to considering the important distinctions between colorblind and race-conscious objections, the next generation of civil rights lawyers must also distinguish between the abilities of majority and minority lawyers to make such objections. For example, in certain situations, a white male lawyer may have more latitude to assert race-based objections in a forcefully race-conscious way because he would not be constrained by stereotypes such as the “angry black man.” Consider, for example, an illustration of this experience by Jeff Robinson, a black criminal defense attorney, in lodging a forceful objection to a potential jury member’s improper consideration of race—and then paying the price, to a certain extent:

You have to be careful not to win the battle but lose the war. Generally, I try to expose subtle references to race or subtle racist comments during voir dire, but you have to be careful about your approach. For example, I had one case that was extremely racially charged. It involved a young black man charged with raping seven white women. During jury selection, there was one white woman who made a racist comment. I had a knock-down, drag-out exchange with her before the jury pool. She kept insisting that she could be fair and impartial. We went back and forth for forty-five minutes, and the questioning was heated—I was angry at her. I tried several times to excuse her for cause. At the end, the judge agreed with me. He said, “Yes, there are problems with her objectivity based on race here.” And, he granted the challenge for cause. The problem was that I had created an atmosphere where I was the *angry black man*. When I turned to the jury pool to ask if anyone else had anything to say, no one would talk to me. They were quiet. I had won the battle, but, in that moment, had lost the war. The jury hung ten-to-two to acquit, and I am convinced that I alienated the two jurors who voted to convict. They could not hear the case because my words and attitude drowned out the facts.<sup>254</sup>

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254. Robinson Interview, *supra* note 179.

Robinson's explanation of the tough consequences of his hard line of questioning echoes Carbado and Gulati's insight that "stereotypes structure the interactional dynamics" of environments.<sup>255</sup> In other words, in making his race-based objection, Robinson should have been more cognizant of not only how his client was viewed as a man with "black" skin, but also how *he*, a black attorney, could be viewed as confirming harmful stereotypes—of how he could be transformed from a "good Black" to a "bad Black" by virtue of his behavior. Having suffered that loss, Robinson now takes a different approach to lodging race-based objections—one that not only benefits his clients, but also advances the greater civil rights project of getting people to admit to their racially tinged and even racist views as well as getting those who think that racism no longer exists to see that it persists. Robinson explains:

Now if someone makes a racist statement during jury selection, I say "Thank you very much for your comment! You have a First Amendment right to express your views openly! We all have those rights and should feel free to state what we think. And besides, I kind of think that view is not so unusual. Does anyone else have similar views?" Then, I see what other jury pool members have to say. It is strange, but by rewarding the worst possible answer you can imagine, I am trying to get other people in the pool to reveal themselves as people who hold like-minded racial views. My goal is to create an atmosphere where people can admit to their racially tinged thoughts. I want to create an environment where people feel free to say what they really are thinking.

Even if I cannot get the person excluded, it is still good because they have now "outed" themselves to the rest of the jury. I can ask all the other jurors later, "What are you going to do if you notice that some of the arguments in the jury room are being influenced by racism?" That person has outed themselves, and their credibility with everyone may be compromised.<sup>256</sup>

In this example, we see Robinson lodging a race-based objection in a way that can make persons on the defensive relax and begin to "hear him," such that they actually begin to speak freely, enabling him to better assess the propriety of their having a seat on the jury and to provide better representation for his clients. Civil rights lawyers must begin to develop a similar bundle of tools for both rejecting colorblindness and engaging in race-conscious behavior

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255. CARBADO & GULATI, *supra* note 2, at 65.

256. Robinson Interview, *supra* note 179.

that gets at key civil rights issues, but that does so in ways that do not create great discomfort.

Knowing when and how to assert race-based objections within the courtroom is a requirement in a society like the one Carbado and Gulati describe, in which understandings of race are shifting and “colorblind” means “white.” However, to the extent that race-conscious objections risk the exploitation of racial identity and narrative to advantage or disadvantage clients and communities of color, they may prove inappropriate for majority and minority civil rights lawyers alike.

### *b. Exploiting Race*

White and black civil rights lawyers must also be careful not to employ strategies, words, and meanings that reify harmful constructions of identity and exploit the very people whom they represent. To illustrate this point, we again turn to *Representing the Race*. Mack reveals how black civil rights lawyers exploited the racial identity and narrative of black clients and communities through speech, gesture, and silence by relying on damaging stereotypes to portray their black clients or otherwise disparaging their black clients’ identities in order to spare them from a death sentence, lessen their punishments in any other way, or gain an adversarial advantage in defending their clients. Such tactics exposed the deep-seated paternalism, class bias, and elitism infusing the professionalism and self-image of the rising twentieth-century black bar.

Remarking on the interpretive “problem” of black lawyers’ and clients’ divergent “perceptions” of courtroom culture and custom, Mack points out that “the supposedly fixed views of black clients toward the work that race did in the courtroom became a staple of [black lawyers’] professional talk.”<sup>257</sup> For example, he describes Charles Hamilton Houston’s efforts to persuade the Loudoun County jury in Virginia to “spare” Crawford from the electric chair—a description that dramatically captures Houston’s identity- and narrative-exploiting efforts to “paint[] Crawford as an obedient ‘homeless hungry dog,’” deferential to racial caste and class and thus deserving of white mercy rather than the death penalty.<sup>258</sup> For Carbado and Gulati, the “explicit racial markers” of Jim Crow-era caste and class persist in various “identity-negating” stereotypes accessible for strategic exploitation.<sup>259</sup> Carbado and

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257. MACK, *supra* note 1, at 67.

258. *Id.* at 105.

259. CARBADO & GULATI, *supra* note 2, at 16, 25.

Gulati note that these admittedly burdensome stereotypes may be put to “use” to gain an advantage despite the social cost of “confirming prejudice.”<sup>260</sup>

Predictably, identity and narrative exploitation occupy myriad forms (trial testimony and appellate briefs), span multiple contexts (pretrial negotiation and trial), and carry different rationales (adversarial necessity and client disposition). Likewise, the lexicon of exploitation—its language, imagery, gesture, and tone—changes depending on client conduct, community context, and local courthouse culture. Still, two constructions of identity and narrative seem generalizable across civil and criminal contexts. The first posits the racial inferiority and functional disability of black clients and their communities,<sup>261</sup> and the second asserts the racial dignity and solidarity of black clients and their communities.<sup>262</sup>

Both lawyer-shaped constructions emerge inside and outside courtrooms in civil rights and criminal cases. And both frequently generate controversy for black as well as white lawyers, their clients, and the communities they claim to represent. Part of that controversy, according to Carbado and Gulati, stems from the fact that the first interpretive strategy, though perhaps effective in the short term, will eventually backfire and serve only to reinforce current inequalities.<sup>263</sup> Civil rights lawyers must either find means to avoid such tactics altogether or exploit racial stereotypes in ways that both challenge those tropes and help their clients. Jeff Robinson again offers a helpful example of exploiting a racial stereotype to encourage white members of the jury pool to reflect upon their own biases and assumptions:

One strategy I use during voir dire involves my telling a particular story. I say, “One time, I was driving home, and I came to a stop sign. When I stopped, I looked over, and I saw a brand new BMW, with a black kid with cornrows sitting in the front seat, and rap music blasting from the in-car stereo. The first thing I thought was: ‘drug dealer.’” And then I say, “But then I caught myself. I asked myself, ‘What are you thinking, Jeff? That’s racist. A racial stereotype.’” And I say, “I felt

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260. *Id.* at 33.

261. See, e.g., Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998); see also Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996) (discussing various “rotten social background” defenses to criminal charges).

262. This second assertion effectively combines liberty-based and equality-based dignity claims. For the jurisprudential underpinnings of such claims, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

263. CARBADO & GULATI, *supra* note 2, at 40–41.

really bad. I felt really ashamed. Has anyone else ever had those thoughts?" As it happens, this story is not true because, while I have bias like everyone else, I have never thought anything like that. But there is this saying, "I going to tell you a story that *is true*, not because it happened, but because it has truth in it." It is amazing the conversations that we have after I present this narrative. They are amazing. I may even end up leaving people on the jury who said bad things. I remember once there was one white woman, who said, "You know, I walked in here thinking that I was completely unbiased and fair, but I guess I'm not." I definitely left her on the jury because she was willing to admit her bias, and she appeared to be determined to give a judgment that was not impacted by that bias.<sup>264</sup>

Though the first strategy of exploiting stereotypes to one's advantage without also confirming stereotypes may be realistic, the second strategy of asserting the racial dignity and solidarity of black clients and their communities seems increasingly unlikely given the cultural and social incentives that cause many successful black lawyers and professionals to forgo challenges to the status quo. As Carbado and Gulati explain, those incentives strain black lawyers' "political commitments and connections to the black community" and militate against projects of racial solidarity and unity.<sup>265</sup> As Carbado and Gulati's *Acting White?* makes clear, the incentives for black lawyers to engage in racially palatable performances—to avoid making waves in order to show one's worthiness as a "white" lawyer—persist, particularly within the courtroom where the key players—judges, other lawyers, and jurors—continue to be predominantly white. Yet Carbado and Gulati's work—especially their point that litigation and rights-based campaigns that tend to focus on privileged Blacks at the expense of disadvantaged Blacks are simply unable to correct racial wrongs, such as racial profiling, including against privileged Blacks—implicitly suggests that privileged and disadvantaged Blacks' interests may actually converge. If this is true, then perhaps the second strategy of solidarity may not be so unlikely after all. In this instance, the best strategies and tactics would involve "looking to the bottom"—or "studying the actual experience of black poverty and listening to those who have done so" for ideas on how to pursue and achieve justice.<sup>266</sup> The question then becomes: How

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<sup>264</sup> Robinson Interview, *supra* note 179.

<sup>265</sup> CARBADO & GULATI, *supra* note 2, at 10.

<sup>266</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987).

does one not only reintegrate the race in this respect, but also reintegrate the *idea* of race into civil rights work?

### 3. *Reintegrating Race*

Modern civil rights advocacy must refocus on the reintegration of race inside and outside the courtroom. By reintegration, we do not mean simply the assimilation of race. Rather, like Carbado and Gulati, we mean the recognition of difference in the racial content, performance, and presentation of cases, clients, and communities of color. Reintegration of this sort entails not only the recognition or “naming” of race in the core spheres of the lawyering process (i.e., interviewing, counseling, negotiation, fact investigation, trial practice, litigation, and legislative reform); it also requires organizations to consider race an integral factor in their legal-political decisionmaking, delivery of direct services, community development and mobilization, and rights education and outreach. The project of reintegration, of explicitly naming and accounting for race, calls upon both black and white lawyers to reimagine racial identity and narrative in their representation of clients and communities of color. Applied to the legal-political contexts of civil rights advocacy, reintegration may help to disconfirm or combat racial stereotypes.

By design, reimagining racial identity and narrative challenges the long-deformed relationship between courtroom space and race. Historically, as Mack illustrates, racial animus infected courtroom space, segregating lawyers, parties, and witnesses of color, belittling or silencing their voices, and even excluding or intimidating them by threat of violence. It also historically excluded racial minorities, specifically Blacks, from juries. Racial animosity also contaminated the Northern and Southern bar and bench, scarring the image and discourse of legal professionalism. According to Mack, the slow, self-interested erosion of racial animus within the white bar and bench of the 1930s, and perhaps more importantly, within the federal agencies and military branches of the 1940s and 1950s, enabled black lawyers to perform in the roles of counselor and advocate. Even if they were not acting in a spirit of common cause with their white counterparts, black lawyers were at least coexisting in an atmosphere of shared professional dignity. Ironically, inside the courtroom, this enhanced performative freedom and professional standing permitted black civil rights lawyers to *object* to racial discrimination and prejudice and, at the same time, to *exploit* demeaning visions of racial identity and narrative fueled by a deeply ingrained culture of discrimination and social history of prejudice. Tragically, outside the courtroom, the same discretionary freedom and professional status constrained the ability of civil rights lawyers to facilitate cross-racial client/community legal-political decisionmaking in administrative, legislative, workplace, and civic forums.

Consider evidence of this professionalism-induced constraint in Mack's account of the formation of a group called the Four Hundred Ministers, the product of a faith-based grassroots rebellion against the local civil rights establishment in Philadelphia during the late 1950s and early 1960s.<sup>267</sup> To combat entrenched practices of workplace discrimination among Philadelphia companies, Mack explains, the Four Hundred Ministers organized selective patronage campaigns targeting local businesses and demanding the hiring and promotion of "specific numbers of black workers into higher-level jobs."<sup>268</sup> The campaigns, he stresses, were meant to represent the "dispersed power of hundreds of thousands of black consumers who took things into their own hands when the race leadership failed at its appointed task."<sup>269</sup> Indeed, by combining selective boycotts and mass consumer action, the campaigns forced local companies to integrate a previously "white-occupied" private workforce.<sup>270</sup> Later, Mack adds, the same tactics produced "job-training programs for urban youth, and black-owned local business and residential development."<sup>271</sup>

The failure of black civil rights lawyers in Philadelphia during the 1960s to make common cause with the Four Hundred Ministers,<sup>272</sup> their congregations, and their local neighborhood groups in pursuing community and workplace justice campaigns demonstrates the limits of the classical model of civil rights advocacy. Classically trained black civil rights lawyers of the early to mid-twentieth century encountered constraints internal to the very concept of professionalism that motivated their aspirational struggle and external to the courtrooms in which they strived to perform and the fraternities in which they claimed equal standing. Put differently, the compulsive professionalism of the classical phase, and its corresponding emphasis on legal advocacy,<sup>273</sup> poorly served the growing economic-justice demands of impoverished communities and low-wage workers made outside the courtroom in the 1960s and later.

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267. MACK, *supra* note 1, at 248.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 248-49.

272. *Id.* at 250 (citing Letter from Raymond Pace Alexander to the "Four Hundred Negro Ministers" of Greater Phila., "A Plea and Suggestion" (Sept. 16, 1963) (on file with the University of Pennsylvania Archives and Records Center)).

273. For a discussion of the historical shift from the legalistic campaign of the classical phase to the direct action campaign of the late civil rights movement, see Kenneth W. Mack, *Law and Local Knowledge in the History of the Civil Rights Movement*, 125 HARV. L. REV. 1018, 1020-29 (2012) (reviewing BROWN-NAGIN, *supra* note 163).

Echoed today throughout inner cities beset by concentrated or “deep” poverty and stratified labor markets, these demands require the *reintegration* of race into legal-political campaigns to redress inequality in education, health care, housing, environmental policy, and community development.

Building on Carbado and Gulati, the purpose of racial reintegration is not only “stereotype negation,” but also “direct intervention” on behalf of racial groups to expand economic equality, inclusion, and opportunity.<sup>274</sup> Guided by an “ethic of disobedience and resistance,”<sup>275</sup> reintegration pushes black and white civil rights lawyers *out* of the courtroom and away from the familiar comfort of law reform and test-case litigation, and into administrative, legislative, workplace, and civic forums. There, experimental collaborations with community partners (corporate, government, and faith-based) and improvisational tactics (film documentaries, food pantries, and health fairs) produce a protean mix of law, culture, and politics that may very well signal a new phase in civil rights advocacy and legal professionalism.

Consider, for example, the racial reintegration strategy recently undertaken by the Community Research and Environmental Justice Projects of the Historic Black Church Program at the University of Miami School of Law in the West Grove Trolley Garage case.<sup>276</sup> Situated in the historically segregated and long-impooverished community of Miami’s Coconut Grove Village West, the Trolley Garage case presented fairly straightforward land-use issues (notice and industrial zoning) related to the private construction of a municipal trolley maintenance facility (i.e., a bus depot) in a predominantly black, single-family residential neighborhood of the West Grove. At the request of the Coconut Grove Ministerial Alliance of Black Churches, the law-student-staffed Community Research and Environmental Justice Projects investigated the adverse environmental and public-health impact of the facility and presented a report of its findings at a community-wide meeting of West Grove civic activists, clergy, homeowners, nonprofit groups, and municipal officials. The report helped galvanize community opposition to the construction project and bolstered grassroots efforts to organize a media campaign, rally, petition drive,

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274. See CARBADO & GULATI, *supra* note 2, at 156–57.

275. Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEX. L. REV. 635, 653–55 (2012) (reviewing W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010)).

276. Anthony V. Alfieri, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013 WIS. L. REV. (forthcoming). Professor Alfieri is the founder of the Historic Black Church Program and supervises its Community Research and Environmental Justice Projects. He is also a director of the Coconut Grove Ministerial Alliance, a nonprofit consortium of West Grove black churches.



and demonstration at a public hearing; to mobilize local nonprofit and village council support; and to assemble an interracial steering committee and a pro bono homeowner legal defense team.<sup>277</sup> Equally important, the report and its accompanying research revealed longstanding municipal histories of denying public transportation services to the West Grove and also siting polluting facilities in the West Grove. This research transformed a narrow, race-neutral land-use case into a broader race-conscious civil rights controversy, gaining the attention of both the U.S. Department of Justice and the Civil Rights Division of the U.S. Attorney's Office for the Southern District of Florida. That legal-political transformation came as a direct result of racial intervention and reintegration strategies pursued in collaboration with local homeowner associations, ministries, nonprofit groups, and other community partners, a collaboration that signals the continuing promise of community-based civil rights advocacy and citizen resistance.

## CONCLUSION

In *Representing the Race*, Professor Kenneth Mack revives the “double consciousness” concept of W.E.B. Du Bois, one of the founders of the NAACP and one of the key figures in the history of the black civil rights struggle, with an insightful exploration of the roles that early black civil rights lawyers were expected to serve for both Blacks and Whites through their work as legal representatives. In so doing, Mack unveils the great paradox in the lives of these black civil rights attorneys from the early to mid-twentieth century. These attorneys, he explains, found themselves in the difficult position of having to show that they were as much like white lawyers as possible to have a voice and provide effective representation for their clients before white judges, opposing white counsel, and white jurors, and simultaneously that they were as much like the masses of black people as possible in order to be seen and accepted as people who could articulate and serve the interest of all Blacks.<sup>278</sup>

Looking ahead many decades—and, in some cases, nearly a century—at the black professional class, and in particular at black lawyers in major law firms (a group to which Mack's subjects could never have belonged), Professors Devon

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277. For more information on the West Grove Trolley Garage case, see Complaint, *Ward v. City of Miami*, No. 13-03848CA20 (Fla. Cir. Ct. Jan. 31, 2013) (on file with authors); and Jenny Staletovich, *Neighbors of Coconut Grove Trolley Garage Sue Miami City Hall*, MIAMI HERALD, Jan. 31, 2013, <http://www.miamiherald.com/2013/01/31/3211054/neighbors-of-coconut-grove-trolley.html>.

278. MACK, *supra* note 1, at 5.

Carbado and Mitu Gulati focus on a similar conflict for today's black lawyers in their book *Acting White?*. Specifically, Carbado and Gulati explain how black lawyers (and other professionals) struggle today with the "double-bind racial performance" of proving that they are "black enough from the perspective" of other Blacks and "white enough from the perspective" of the white elite.<sup>279</sup> The two authors focus, in particular, on the demand and need for today's black lawyers—the "good Blacks"—to perform their identities in ways that make them racially palatable to Whites and, even more importantly, to distinguish themselves from those Blacks who confirm negative stereotypes about their racial group—the "bad Blacks."

Although a review of the works of Mack, Carbado, and Gulati reveals great similarities between the performances that Blacks have engaged in, and still engage in, in their work as lawyers, it also uncovers critical differences between the lives of black civil rights lawyers in history and today. One notable difference is that black civil rights lawyers' very presence in the courtroom may now be understood as proof that the cause of their clients' fragile positions in society is their own moral failings, rather than institutionalized and structural racism and inequality. Another is an increasingly fragmented black community in which Blacks from lower socioeconomic classes do not necessarily see themselves as being of the same race as more economically privileged Blacks.

As we discuss in this Book Review, these changing social circumstances present numerous challenges for the civil rights lawyers of today and tomorrow. Acknowledging these difficulties, we offer a number of alternative strategies and tactics that these lawyers may want to employ to advance civil rights goals. For instance, we encourage civil rights lawyers to think deeply and carefully about how they may better control the way in which issues are framed and understood by the general public and thus advance the project of racial reconstruction. As one example of how frames may be altered to begin to carry out reconstructive racial projects, we offer our own suggestions to improve a present-day campaign against racial profiling by the ACLU, which Carbado and Gulati critique as reinforcing the notion of "good Blacks v. bad Blacks" by focusing on the harms of racial profiling for "innocents"—here, professional black and brown men.<sup>280</sup> We also highlight the need for the next generation of civil rights lawyers to embrace their own roles as well as the roles of other lawyers in the civil rights struggle, regardless of their races.

Finally, we contend that the next generation of civil rights lawyers must be cognizant of how race, and specifically the performance of their race, will

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279. CARBADO & GULATI, *supra* note 2, at 1.

280. *Id.* at 107-08.

influence other actors' interpretations of their representation of their clients. We highlight, for example, that matters as simple as dress can influence how a lawyer and her work are received in the courtroom.

Moreover, as part of those performances, we urge today's and tomorrow's civil rights lawyers to maintain their resistance to racism in the courtroom through both explicit and implicit objections to racism, but to do so while recognizing the discomfort that such objections may cause and by developing tactics that challenge racism in effective, but non-alienating, ways. Even as we stress the impact of racial performances on how lawyers and their arguments are received, we insist that each civil rights lawyer remain authentic to herself—and more importantly, to the ultimate cause at hand—by refusing to employ strategies and tactics that further entrench damaging racial stereotypes and conceptions. Such issues and questions will be intensely personal: these lawyers will have to decide how they will remain true to themselves, their morals, and the mission of civil rights work in their representations. Reflecting on his own experience, Jeff Robinson explains:

Sometimes, it can be challenging. You ask yourself, "Am I selling out here? Am I kowtowing to the wrong pressures?" But at the end of the day, I am a really good lawyer. If a certain style helps to make that clearer, makes it possible for them to hear me more, then I am being who I am—a very powerful advocate. You can maintain your own personal integrity and be who you are. I want them to think that I am a wonderful black advocate. They are never going to get rid of the "black." I just know and accept that—in this lifetime.<sup>281</sup>

We acknowledge that all of our suggested tasks will be tough, but we feel compelled to highlight their necessity for the advancement of civil rights. After all, civil rights lawyers in the past played a critical role in unearthing racial injustices in their many forms. Without their voices, our society would be further behind than we are now on the road to racial equality. For this reason, despite the pushback in a society that increasingly wants to call itself postracial,<sup>282</sup> we reiterate the importance of civil rights lawyers' voices in community efforts to eliminate racial inequalities.

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281. Robinson Interview, *supra* note 179.

282. See Cho, *supra* note 153, at 1594 (2009).

